AGRICULTURE DECISIONS

Volume 48

January - June 1989
Part Three
Pages 550-749

THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

PREFATORY NOTE

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the Federal Register and, therefore, they are not included in AGRICULTURE DECISIONS.

Consent Decisions entered subsequent to December 31, 1986, are no longer published. However, a list of the decisions is included. (53 Fed. Reg. 6999, March 4, 1988.) The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized by regulatory agency and statute, and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; S. 1150, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

Direct all inquiries regarding this publication to: Editors, Agriculture Decisions, Hearing Clerk Unit, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1081 South Building, Washington, D.C. 20250-9200, Telephone: (202) 447-4443.

LIST OF DECISIONS REPORTED

JANUARY - JUNE 1989

PERISHABLE AGRICULTURAL COMMODITIES ACT

DISCIPLINARY DECISIONS

LIST OF DECISIONS RELATED

JANUARY - JUNE 1989

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

LIST OF DECISIONS REPORTED

JANUARY - JUNE 1989

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

LIST OF DECISIONS REPORTED

JANUARY - JUNE 1989

PERISHABLE AGRICULTURAL COMMODITIES ACT

DISCIPLINARY DECISIONS

In re: WILBUR L. BROWN, JR., d/b/a BARBER SALES.
PACA Docket No. D-88-504.
Decision and Order filed January 3, 1989.

Failure to account truly and correctly - Revocation of license.

Grower's agent failed to account truly and correctly to principal with regard to transaction involving perishable agricultural commodities. PACA license may not be revoked without a preliminary finding being made that the actions of the licensee were "repeated and flagrant."

Edward M. Silverstein, for Complainant.
Richard L. Katz, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.)*; hereinafter the "PACA"), the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 C.F.R. §§ 1.130 through 1.151; hereinafter the "Rules of Practice"). The proceeding was instituted by a complaint filed by the Agricultural Marketing Service. The complaint alleged respondent was a growers' agent who violated Section 2 of the PACA (7 U.S.C. § 499b) by failing to account truly and correctly to two growers with respect to 420 shipments of peaches, a perishable agricultural commodity sold in interstate commerce, and underpaid the growers $161,374.70. Respondent filed both an answer and an amended answer. Respondent offered to consent to a revocation of his PACA license but refused to admit that he had committed "repeated and flagrant" violations of the PACA. The issue of whether a PACA license may be revoked without such preliminary findings was ruled upon by the Judicial Officer. He ruled that "repeated and flagrant" findings are required before jurisdiction to revoke a PACA license vests.

Accordingly, I held an oral hearing on November 22, 1988, in Miami, Florida. Complainant was represented by Edward M. Silverstein, Esq., Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. 20250. Respondent was represented by Richard L. Katz, Esq., 2100 Salzedo Street, Suite 300, Coral Gables, Florida 33134. Respondent, though served with a subpoena (Exhibit 1), did not personally attend the hearing.

Pertinent Statutory Provisions

Sec. 2(4) of the PACA.

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce-

* * * * *

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under Section 5(c);

Sec. 8(a) of the PACA.

(a) Whenever (a) the Secretary determines as provided in Section 6 that any commission merchant, dealer, or broker has violated any of the provisions of Section 2, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated Section 14(b) of this Act, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Pertinent Regulations

9 C.F.R. § 46.2(y).

'Truly and correctly to account' means, in connection with:

(1) Consignments, to account by rendering a true and correct statement showing the date of receipt and date of final sale, the quantities sold at each price, or other disposition of the produce, and the proper usual or specifically agreed upon selling charges and expenses properly incurred or agreed to in the handling thereof, plus any other information required by § 46.29;

* * * * *

7 C.F.R. § 46.2(z).

'Account promptly,' except when otherwise specifically agreed upon by the parties, means rendering to the principal a true and correct accounting:

* * * * *

(2) In connection with consignment or joint account transactions, within 10 days after the date of final sale with respect to each shipment, or within 20 days from the date the goods are accepted by destination, whichever comes first: *Provided,* That whenever a grower's agent or shipper distributes individual lots of produce for or on behalf of others, accounting to the principal shall be made within 30 days after receipt of the shipment from the principal for sale or within 5 days after the date the agent receives payment for the goods, whichever comes first. Whenever a grower's agent or shipper harvests, packs, or distributes entire crops or multiple lots therefrom for or on behalf of others, an accounting on the initial shipment shall be rendered within 30 days after receipt of the goods for sale. Accounting for subsequent shipments shall be made at 10-day intervals from the date of the accounting for the initial shipment and a final accounting for the season shall be made to each principal within 30 days from the date the agent receives the last shipment for the season from that principal ***.

7 C.F.R. § 46.2(aa).

'Full payment promptly' is the term used in the [PACA] in specifying the period of time for making payment without committing a violation of the [PACA]. 'Full payment promptly,' for the purpose of determining violations of the [PACA], means:

* * * * *

(9) Whenever a grower's agent or shipper harvest, packs, or distribute entire crops or multiple lots therefrom for or on behalf of others payment for the initial shipment shall be made within 30 days after receipt of the goods for sale or within 5 days after the date the agent receives payment for the goods, whichever comes first. Payment for subsequent shipments shall be made at 10-day intervals from the date of the accounting for the initial shipment or within 5 days after the date the agent receives payment for the goods, whichever comes first, and final payment for the seasons shall be made to each principal within 3 days from the date the agent receives the last shipment for the season from that principal.

* * * * *

Findings of Fact

1. Respondent, Wilbur L. Brown, Jr., is an individual doing business as Barber Sales whose business mailing address is P.O. Box 111, Hastings, Florida 32045.

2. Pursuant to the licensing provisions of the PACA, license number 801320 was issued to respondent on July 22, 1980. This license was renewed annually, but terminated on July 22, 1988, pursuant to Section 4(a) of the PACA, 7 U.S.C. § 499d(a), when respondent failed to pay the required annual license fee.

3. During the period May through July 1986, respondent, acting as a grower's agent on behalf of D&E Farms, Reynolds, Georgia, sold 271 shipments of peaches, a perishable agricultural commodity. Respondent failed to account truly and correctly as to 235 of the 271 shipments and underpaid D&E Farms $84,648.35.

4. During the period May through July 1986, respondent, acting as a grower's agent on behalf of B. J. Barnett, Inc., Dalzwell, South Carolina, sold 216 shipments of peaches, a perishable agricultural commodity. Respondent failed to account truly and correctly as to 185 of the 216 shipments and underpaid B. J. Barnett, Inc. $76,726.35.

Conclusion

Respondent committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. § 499b) warranting publication of this finding and revocation of respondent's PACA license.

Discussion

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful, *inter alia*, for any commission merchant, dealer, or broker to fail to "make full payment promptly" of its obligations with regard to transactions involving perishable agricultural commodities made in interstate commerce. Departmental regulations (7 C.F.R. §§ 46.2(aa)(9)) defines "full payment promptly," so as to require payment by a grower's agent within 30 days after the day on which the initial shipment is received or within five days after the grower's agent receives payment for the produce, whichever comes first. In addition, the grower's agent must make payments for subsequent shipments in 10-day intervals from the date of the accounting for the initial shipment or within 5 days after he receives payment for the shipment, whichever comes first. Furthermore, final payment must be made within 30 days from the date the grower's agent received the last shipment for the season from the farmer. True and correct accountings for these shipments must be made by the grower's agent to the farmer within the same time frame. *See* 7 C.F.R. § 46.2(z)(2).

Respondent neither appeared at the hearing nor presented any evidence to contradict complainant's which showed respondent underpaid the farmers for whom he acted as agent. Moreover, he reported lesser amounts than he actually collected for their peaches. Complainant's evidence consistent of

respondent's own business records and documents which he provided to complainant's investigators. Failures to truly account and make timely payment violated Section 2 of the PACA. *Atlantic Produce*, 35 Agric. Dec. 1631 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978). Moreover, the numerous violations committed by respondent constitute flagrant and repeated violations of the PACA. *American Fruit Purveyors v. United States*, 630 F.2d 370, 373-374 (5th Cir. 1980); *G. Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd sub. nom., George Steinberg and Son, Inc. v. Butz, supra*, 491 F.2d 988. Furthermore, inasmuch as respondent underreported the amounts he received for peaches to his principals, his actions must be construed as willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *Henry S. Shatkin*, 34 Agric. Dec. 296 (1975); *G. Steinberg & Son, supra*, 32 Agric. Dec. 236, 263-269; *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961).

Respondent has contended that because I originally revoked the license without entering findings, jurisdiction to presently do so was lost. This contention is without merit. My original order was vacated on jurisdictional grounds. Jurisdictional issues may be raised and considered at any time. The Judicial Officer ruled that a PACA license may not be revoked without a preliminary finding being made that the actions of the licensee were "repeated and flagrant." It was for this reason that the Miami hearing was held. Respondent had every opportunity at that hearing to refute the evidence presented by complainant. He chose instead to rely upon the "Fifth Amendment" and neither appeared nor presented any evidence. Even if his nonparticipation is not construed as raising inferences adverse to his position, the lack of any contradictory evidence requires this case to be decided on the basis of the evidence presented by complainant - evidence which I have found to be reliable, credible and substantial. Respondent's own records were introduced to prove his failure to make timely payments and his underreporting of amounts collected to his principal. Those records stand uncontroverted and fully support today's decision and order. Accordingly, respondent is found to have willfully, flagrantly and repeatedly violated the PACA. *See Harry Klein Produce v. U.S. Dept. of Agriculture, supra,* 831 F.2d 403.

Sanction

As sanction for its violations, complainant seeks revocation of respondent's license as the proper sanction in this matter. Support for the issuance of this sanction is found in the testimony of Mr John M. Clark. There, the decisive factors which entered into complainant's consideration for this recommendation were discussed. Those factors included: the gravity of respondent's violations of the PACA, i.e., his violation of the fiduciary duty he owed his principals (a most serious violation of the Act); the number of violations committed by respondent (420); and the amount of money involved ($161,374.70). Taking all these factors into consideration, the sanction sought

by complainant should be granted. *J. H. Norman & Sons Distributing Co., supra*, 37 Agric. Dec. 705; *G. Steinberg & Son, supra*, 32 Agric. Dec. 236.

Order

Respondent's license is revoked.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service as provided in Section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final February 16, 1989.-Editor]

In re: DOMINIC PALAZZOLO, d/b/a DOMINIC PALAZZOLO & SONS.
PACA Docket No. D-88-526.
Decision and Order filed January 19, 1989.

Failure to make full payment promptly.

Andrew Y. Stanton, for Complainant.
Anthony Bellanca, for Respondent.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter "PACA"), instituted by a complaint filed on May 21, 1988, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

It is alleged in the complaint that during the period December 1986 through September 1987, respondent purchased from 26 sellers, in interstate commerce, 55 lots of perishable agricultural commodities, but failed to make full payment promptly of a portion of the agreed purchase prices, in the amount of $176,398.73. Complainant further alleged that such actions were wilful, flagrant and repeated violations of Section 2 of the PACA, and requested that respondent's PACA license be revoked. Respondent's license has terminated since the filing of the complaint, thus requiring complainant to change its requested sanction to a finding that respondent has committed wilful, flagrant and repeated violations of the PACA, and that such finding be published.

Complainant filed a motion for decision and proposed decision and order on August 16, 1988, alleging that respondent had not filed a timely answer and was thus in default.

On September 6, 1988, respondent filed his answer, in which he alleged that he had made payments to the 26 produce sellers set forth in the complaint, but admitted that he still owed them $25,000.00.

In a September 9, 1988, conference call, the administrative law judge set a hearing date for December 29, 1988. Complainant's attorney agreed to change the requested sanction to a 90-day license suspension if respondent paid all produce debts in full by the hearing date and incurred no new produce debts. Respondent said he would consent to a 90-day suspension. The administrative law judge ruled that in order for a consent to occur, respondent's produce debts should be eliminated by December 1, 1988.

Complainant has filed a Motion for Decision on the Pleadings, and a supporting memorandum, asserting that since respondent has admitted committing wilful, flagrant and repeated violations of the PACA, and full payment of respondent's produce debt has not been made as of December 2, 1988, the administrative law judge should issue, without hearing, a finding that respondent committed wilful, flagrant and repeated violations of the PACA, and publication of such finding. Complainant's position has merit, and its motion will be granted in accordance with 7 C.F.R. § 1.139. On January 9, 1989, Respondent's counsel filed an Answer to the motion which has been considered.

Findings of Fact

1. Respondent, Dominic Palazzolo, d/b/a Dominic Palazzolo & Sons, is an individual proprietorship whose address is 29581 Ruthdale, Roseville, Michigan 48066.

2. Pursuant to the licensing provisions of the PACA, license number 730286 was issued to respondent on September 12, 1983. This license had been renewed annually, but terminated on September 12, 1988, pursuant to § 4(a) of the PACA (7 U.S.C. § 499D(a)) when respondent failed to pay the required annual license renewal fee.

3. The Secretary has jurisdiction in this proceeding.

4. As more fully set forth in complainant's complaint and Motion for Decision on the Pleadings and Memorandum in Support Thereof, during the period December 1986 through September 1987, respondent purchased from 26 sellers, 55 lots of perishable agricultural commodities, in interstate commerce, but has failed to make full payment promptly of the agreed purchase prices totaling $176,398.73.

Conclusion

repeated violations of Section 2 of the PACA (7 U.S.C. § 499b). Accordingly, the following order is issued.

Order

A finding is made that respondent has committed wilful, flagrant and repeated violations of Section (2) of the PACA, and such finding shall be published.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision shall become final without further proceedings 35 days after service hereof, unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final March 1, 1989.-Editor]

In re: CHARLES CROOK WHOLESALE PRODUCE AND GROCERY CO., a/t/a CROOK PRODUCE CO.
PACA Docket No. D-88-506.
Decision and Order filed January 27, 1989.

Failure to make full payment promptly - Policy involving license revocation.

The Judicial Officer affirmed Judge Baker's order revoking respondent's license for failure to make full payment to 24 sellers for 153 lots of produce from January 1986 through August 1986, totaling $273,227.85. The argument that produce creditors will suffer if respondent's license is revoked is rejected because the Secretary must consider the broader public interest, involving thousands of suppliers and licensees throughout the country.

Sharlene Lassiter, for Complainant.
James R. Sheatsley, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),[1] in which Administrative Law Judge Dorothea A. Baker (ALJ) filed an initial Decision and Order on September 8, 1988, revoking respondent's license for failure to make full payment to 24 sellers for 153 lots of produce from January 1986 through August 1986, totaling $273,227.85.

On December 1, 1988, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5

---

[1] *See generally* Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 4 (1981 and 1988 Cum. Supp.), and Becker and Whitten, *Perishable Agricultural Commodities Act*, in 10 Hart, Agricultural Law, ch. 72 (1980).

U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[2] On January 4, 1989, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act, instituted by a complaint filed on November 6, 1987, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleged that during the period January 1986 through August 1986, respondent purchased, received and accepted, in interstate commerce, from 24 sellers, 153 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $273,227.85, and that such failures to pay constituted wilful, flagrant and repeated violations of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the PACA, for which complainant requested revocation of respondent's PACA license.

A copy of the complaint was served upon respondent which filed an answer, denying the allegations of the complaint except that it admitted having filed for bankruptcy on August 13, 1986. Complainant filed a motion for judgment on the pleading based upon admissions contained in respondent's bankruptcy petition. Complainant's motion is granted and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Respondent denied the material allegations of the complaint with the exception of the filing for bankruptcy which respondent admitted.

Due consideration has been accorded to respondent's contentions set forth in "Response of Respondent to the Department's Motion to Postpone Hearing and Motion for Decision," filed August 31, 1988.

The pleadings herein are a sufficient basis for rendering a decision as requested by the Department. No legally sustainable reason has been

relating to Adversary Proceeding 88-0027, would pre-empt the authority of the Secretary of Agriculture, acting in his regulatory capacity. By the filing of the complaint herein, the Secretary has indicated that he is exercising his authority to proceed in this disciplinary, administrative action. It is determined that no oral hearing is necessary.

Although some amounts of past due monies have been paid, or payment arrangements entered into, it is clear that the acts of the respondent in failing to make full payment promptly of the agreed purchase prices for produce it purchased, received and accepted, constitute wilful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. § 499b). *Finer Foods Sales Co. v. Block,* 708 F.2d 774 (D.C. Cir. 1983); *Kaplan's Fruit and Produce Co.,* 45 Agric. Dec. 333 (1985); *Emerson Elliott Produce,* 45 Agric. Dec. 1199 (1986); *Green Village Fruit and Vegetable, Inc.,* 45 Agric. Dec. 1202 (1986); and *Farm Market Service, Inc.,* 44 Agric. Dec. 316 (1985), wherein it was stated, *inter alia*:

> Respondent's failures to make timely payment, *** are clearly in violation of the prohibitions of Section 2 of the PACA (7 U.S.C. § 499b). *Atlantic Produce,* 35 Agric. Dec. 1631 (1976), *aff'd mem.,* 568 F.2d 772 (4th Cir.), *cert. denied,* 439 U.S. 819 (1978).
>
> * * *
>
> The numerous violations committed by respondent constitute flagrant and repeated violations of the PACA. *American Fruit Purveyors v. United States,* 630 F.2d 370, 373-374 (5th Cir. 1980), *cert. denied,* 450 U.S. 997 (1981); *G. Steinberg & Son, Inc.,* 32 Agric. Dec. 236 (1973), *aff'd sub nom. George Steinberg & Son, Inc. v. Butz, supra,* 491 F.2d 988 (footnote omitted). These violations were willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute.

Other more recent cases setting forth the position of the Department are: *McQueen Brothers Produce Co.*, PACA Docket No. 2-6956, September 8, 1988, [*appeal docketed*, No. 88-3214 (7th Cir. Nov. 15, 1988)], and *Moore Marketing Int'l, Inc.,* PACA Docket No. 2-7088, September 8, 1988.

The present status of the pleadings warrant the issuance of the following Findings of Fact, Conclusions and Order.

Findings of Fact

1. Respondent, Charles Crook Wholesale Produce and Grocery Co., a/t/a Crook Produce Co., is a corporation whose mailing address is New River Industrial Park, 150 Ragland Road, Beckley, West Virginia 25801.

2. Pursuant to the licensing provisions of the PACA, license number 730035 was issued to Crook Produce Co., on July 17, 1972. This license was renewed annually and remains in effect.

3. On August 13, 1986, respondent filed in the United States Bankruptcy Court for the Southern District of West Virginia, a voluntary petition under Chapter 11 of the Bankruptcy Code. In such petition, respondent listed as secured and unsecured creditors the 24 sellers set forth in paragraph 5 of the complaint. Respondent admitted owing these 24 sellers $300,906.88, of which $273,277.85 constitutes the failures to make full payment promptly alleged in paragraph 5 of the complaint.

4. As more fully set forth in paragraph 5 of the complaint, during the period of January 1986 through August 1986, respondent purchased, received and accepted, in interstate commerce, from the 24 sellers referred to in Finding of Fact No. 3 above, 153 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $273,227.85.

Conclusion

Respondent's failure to make full payment promptly with respect to the 153 transactions set forth in Finding of Fact No. 4, above, constitutes wilful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's court-appointed trustee in bankruptcy filed an answer stating that he is "without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 5 of the complaint [alleging respondent's failure to pay for $273,227.85 worth of produce] and demands strict proof thereof" (Answer at 1). However, respondent's answer impliedly concedes that full payment has not been made to respondent's produce creditors, stating (Answer at 2-3):

> 8. By way of further defense, the Respondent asserts that pursuant to 7 U.S.C. § 499G, it must be given an opportunity to make reparation to the sellers set forth herein, which said reparation and the ability of the Respondent to make said reparation is integrally related to the instant bankruptcy proceeding acknowledged by the United States Department of Agriculture in paragraph 7 of the Complaint.
>
> . . . .
>
> 11. The Respondent raises the existence of the Bankruptcy case of Crook Wholesale Produce and Grocery Co. Inc., acknowledged by the Secretary of the Department of Agriculture as Case 86-501-91 in the Southern District of West Virginia, and asserts that this revocation proceeding is filed in an effort to subvert the authority and jurisdiction of the United States Bankruptcy Court for the Southern District of West Virginia relative to the financial rehabilitation of the Respondent herein,

all of which would be materially, detrimentally, and permanently effected by any revocation of licensure.

Similarly, in the Response of Respondent to the Department's Motion to Postpone Hearing and Motion for Decision on the Pleadings filed August 31, 1988, respondent impliedly admits that full payment has not been made to the produce creditors, stating (Response at 5-6, 9):

In its Motion for Ruling on the Pleadings, the Department of Agriculture recites certain unpaid sums to creditors of Crook Wholesale Produce & Grocery Co. Inc. and in conclusory language states that all such failures to pay were willful, flagrant, and repeated violations of PACA. The Department overlooks the fact that of the indebtedness to the PACA creditors, sums in excess of Eighty-Two Thousand Dollars ($82,000.00) have been paid by the Respondent Trustee pursuant to negotiations reached with said creditors in the framework of the bankruptcy case itself, the proper arena for seeking payment of all claims including priority PACA claims against the Debtor's estate. Issues of the latches of other PACA creditors who have as yet failed to solicit payment within the bankruptcy case, the substantial payments made to other PACA creditors, and numerous other factors which are not before the Secretary or Judge in this case exist and mitigate against the propriety of summary relief being issued.

The bankruptcy filing following the heels of the apparent period of time during which Crook Wholesale Produce & Grocery Co. Inc. failed to pay certain PACA creditors, the appointment of the Respondent Trustee into the case in July of 1987, and the herein referenced payments to certain PACA creditors pursuant to settlement and court order, all constitute sufficient data indicating that a summary review of the case in light of the current state of the pleadings cannot lead to an equitable or just determination of the basic issues. . . .

. . . .

1. The suspension or revocation will effectively put the Debtor estate and Respondent Trustee out of business.

2. The effect of said closure will prohibit the Debtor entity's viable chances of making payment in full to the remaining PACA claimants which have not heretofore been paid by the Trustee.

3. The Debtor estate and its Trustee (i.e., the entities to be prejudiced by an Order of Revocation or Suspension) have made efforts to comply with PACA paying in full current suppliers and making payments on past due accounts which arose on a prepetition basis relative to the bankruptcy case.

4. The current suppliers of perishable produce will lose a viable customer and source of future sales.

In short, the efforts of the Department of Agriculture to revoke or suspend the PACA license of Crook Wholesale Produce & Grocery Co. Inc., if said suspension carries over to the Debtor's estate and its trustee, will operate contrary to the purposes of the PACA statute itself which is designed to protect the interests of suppliers of perishable produce not to eliminate markets for them.

In accordance with numerous precedents, revocation of respondent's license is appropriate. See, e.g., *In re B.G. Sales Co.*, 44 Agric. Dec. 2021 (1985), attached as an appendix to this decision. *B.G. Sales Co.* also answers respondent's contention that respondent's license cannot be revoked because of its bankruptcy proceeding. In *B.G. Sales Co.*, the following cases should be added to note 3, p. 5:

In re Roman Crest Fruit, Inc., 46 Agric. Dec. ____, slip op. at 5 (Apr. 7, 1987); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 175 n.2 (1987).

Also, to note 4, p. 5, add:

In re Walter Gailey & Sons, Inc., 45 Agric. Dec. 729, 732 (1986); *In re Top Quality Fruit & Produce Distribs., Inc.*, 45 Agric. Dec. 326, 327 (1986); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2024 (1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2018 (1985).

Also, to note 5, p. 5, add:

In re Anthony Tammaro, Inc., 46 Agric. Dec. 173 (1987).

Also, to note 10, p. 9, add:

In re McQueen Bros. Produce Co., 47 Agric. Dec. ___ (Sept. 8, 1988), *appeal docketed*, No. 88-3214 (7th Cir. Nov. 15, 1988).

Also, to note 12, p. 10, add:

In re Roman Crest Fruit, Inc., 46 Agric. Dec. ____, slip op. at 18-19 (Apr. 7, 1987).

Also, to note 13, p. 11, add:

In re Roman Crest Fruit, Inc., 46 Agric. Dec. ____, slip op. at 18-19 (Apr. 7, 1987).

Also, to note 14, p. 12, add:

In re Anthony Tammaro, Inc., 46 Agric. Dec. 173, 177 (1987) (nonpayment because of bankruptcy resulting after respondent suddenly lost its largest customer); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2028 (1985) (nonpayment because bank suddenly refused to extend credit as it agreed, and the bank took $50,000 of respondent's funds in the bank's possession); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1246 n. 3 (1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986) (nonpayment because respondent suffered about $200,000 in losses in 2-year period from theft of produce from his warehouse).

And, finally, to note 16, p. 15, add:

In re Carpenito Bros., Inc., 46 Agric. Dec. 486, 489-90 (1987) (delayed payments under color of implied agreements with suppliers), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988) (unpublished; text in WESTLAW).

In addition, in *B.G. Sales Co.*, the following cases cited therein have updated citations as follows:

In re C.B. Foods, Inc., 40 Agric. Dec. 961, (1981), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982)

In re Columbus Fruit Co., 40 Agric. Dec. 109 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982)

In re Cuttone, 44 Agric. Dec. 1573 (1985), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished)

In re Farm Market Serv., Inc., a/t/a FMS, 44 Agric. Dec. 316 (1985)

In re Fava & Co., 46 Agric. Dec. 79 (1984)

In re Food Marketers, Inc., 44 Agric. Dec. 1578 (1985)

In re Gilardi Truck & Transp., Inc., 43 Agric. Dec. 118 (1984)

In re Jarosz Produce Farms, Inc., 42 Agric. Dec. 1505 (1983)

In re Clarence Miller Co., 43 Agric. Dec. 529 (1984)

In re Oliverio, Jackson, Oliverio, Inc., 42 Agric. Dec. 1151 (1983)

In re A. Pellegrino & Sons, Inc., 44 Agric. Dec. 1602 (1985), *appeal dismissed*, No. 85-1590 (D.C. Cir. Sept. 29, 1986)

In re Reeves Produce, Inc., 44 Agric. Dec. 1607 (1985), *aff'd per curiam*, 790 F.2d 163 (D.C. Cir. 1986) (unpublished)

In re Veg-Mix, Inc., 44 Agric. Dec. 1583 (1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987)

Respondent's final argument, that produce creditors will suffer if its license is revoked, was rejected in *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 142-43 (1984), as follows:

> Respondent argues that it would be detrimental to its creditors if it were forced to discontinue business. Such arguments are frequently made and routinely rejected. Even where creditors of a respondent personally appear to urge the Department to permit the violator to continue in business, so that the violator will be able to make additional payments to the creditors, the Secretary routinely rejects such pleas for leniency made by creditors since the Secretary must consider the broader public interest, involving thousands of suppliers and licensees throughout the country.[21] If lenient sanctions were imposed in the case of serious and flagrant violations of the Act for the benefit of a few of respondent's creditors, the sanctions would not have a strong deterrent effect and, therefore, such a policy would be contrary to the public interest.
>
> Similarly, under all of the regulatory programs administered by the Department, any hardship to the respondent's community, customers or employees which might result from a disciplinary order is given no weight in determining the sanction, in order to protect the broader public interest, which is best served by imposing severe sanctions for serious or repeated violations, to serve as an effective deterrent to future violations.[22]

---

[21]*In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. [1151, 1170-72 (1983)]; *In re Bananas, Inc.*, 42 Agric. Dec 426, 426-27 (order denying intervention), *final decision*, 42 Agric. Dec. [588, 606 (1983)]; *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *[aff'd*, 728 F.2d 347 (6th Cir. 1984)]; *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467.

[22]*In re Powell*, 41 Agric. Dec. 1354, 1365 (1982); *In re Hatcher*, 41 Agric. Dec. 662, 670-71 (1982); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 825 (1979); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1737-38 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128-29, 1136 (1977), *aff'd mem.*, 575 F.2d 879 (5th Cir. 1978); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989-90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851-52

(1975); and *see In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120-21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978).

Accord In re Rodman, 47 Agric. Dec. ___, slip op. at 1 (Sept. 22, 1988) (order denying reconsideration); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 177-78 (1987); *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 171 (1987), *aff'd*, 831 F.2d 403 (2d Cir. 1987); *In re Garver*, 45 Agric. Dec. 1090, 1097-98, 1104 (1986), *reconsideration denied*, 45 Agric. Dec. 1957 (1986), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 109 S. Ct. 63 (1988); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 623, 636 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987).

For the foregoing reasons, the following Order should be issued.

Order

The license of respondent Charles Crook Wholesale Produce and Grocery Co., a/t/a Crook Produce Co., is hereby revoked.

This Order shall take effect on the 30th day after service of this Order on respondent.

APPENDIX

In re B.G. Sales Co., 44 Agric. Dec. 2021 (1985).

In re: JOHN A. PIRRELLO CO., INC.
PACA Docket No. D-88-524.
Decision and Order filed January 27, 1989.

Failure to make full payment promptly - Revocation of license in disciplinary proceeding.

The Judicial Officer affirmed Chief Judge Palmer's order revoking respondent's license for failure to make full payment to 11 sellers for 115 lots of produce totalling $397,197.39. Section 4(a) of the Act (7 U.S.C. § 499d(a)), which requires the Secretary to examine the circumstances of a bankruptcy to determine whether such circumstances warrant termination of the bankrupt's license, is not relevant in a disciplinary proceeding to revoke respondent's license for failure to pay for produce. Respondent's argument that produce creditors will suffer if its license is revoked is rejected because the Secretary must consider the broader public interest involved. Complainant is not required to prove not only that respondent failed to pay for produce, but, also, that it failed to account correctly.

Edward M. Silverstein, for Complainant.
Paul R. Salvage, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a disciplinary proceeding under the Perishable Agricultura Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),* in which Chie Administrative Law Judge Victor W. Palmer (ALJ) filed an initial Decisio and Order on September 13, 1988, revoking respondent's license for failur to make full payment to 11 sellers for 115 lots of produce totaling $397,197.3

On October 14, 1988, respondent appealed to the Judicial Officer, to whor final administrative authority to decide the Department's cases subject to U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).** On Novembe 8, 1988, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 C.F.I § 1.145(d)), was requested by respondent, but is denied inasmuch as the issu are not difficult, the case has been thoroughly briefed, and oral argume would seem to serve no useful purpose.

Based upon a careful consideration of the entire record, the initial Decisi and Order is adopted as the final Decision and Order in this case, except th the effective date of the order is changed in view of the appeal. Additior conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultu Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinaf referred to as the "Act," instituted by a complaint filed on April 18, 1988, the Director, Fruit and Vegetable Division, Agricultural Marketing Servi United States Department of Agriculture. It is alleged in the complaint t during the period November 1986 through May 1987, respondent purchas received and accepted, in interstate and foreign commerce, from 11 sell 115 lots of fruits and vegetables, all being perishable agricultural commodit but failed to make full payment promptly of the agreed purchase prices balances thereof in the total amount of $397,197.39.

A copy of the complaint was served upon respondent which complaint not been answered.[1] The time for filing an answer having run, and upon

---

*See generally Campbell, *The Perishable Agricultural Commodities Act Regulatory Prog* in 1 Davidson, Agricultural Law, ch. 4 (1981 and 1988 Cum. Supp.), and Becker and Wh *Perishable Agricultural Commodities Act*, in 10 Hari, Agricultural Law, ch. 72 (1980).

**The position of Judicial Officer was established pursuant to the Act of April 4, 19 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *rep in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appoint January 1971, having been involved with the Department's regulatory programs since (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals fro decisions of the prior Judicial Officer; and 8 years as administrator of the Packer Stockyards Act regulatory program).

[1]It should be noted that, although respondent failed to file an answer to the complain herein, it did make a motion seeking to have this proceeding stayed pending the conclus its bankruptcy petition. This motion was denied in an order issued July 26, 1988, becau (contin

motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, John A. Pirrello Co., Inc., is a corporation, whose mailing address is P.O. Box 70060 Bridgewood Station, Springfield, Massachusetts 01107.

2. Pursuant to the licensing provisions of the Act, license number 830537 was issued to respondent on February 7, 1983, was renewed annually, presently is in effect, and was next subject to renewal on or before February 7, 1989.

3. As more fully set forth in paragraph 5 of the complaint, during the period [December 1985] through [November 1986] respondent purchased, received and accepted in interstate and foreign commerce, from 11 sellers, 115 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $397,197.39.

Conclusion

Respondent's failure to make full payment promptly with respect to the 115 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The allegations of the complaint, which are admitted by respondent's failure to file a timely answer, allege that respondent still owes the total amount of $397,197.39 alleged in paragraph 5 of the complaint to its creditors (Complaint, ¶ 5). Furthermore, respondent's briefs and other documents make it clear that respondent does not dispute the fact that it still owes large sums to its produce creditors.

Respondent contends that the summary disposition of this case prevents a review of the circumstances surrounding respondent's bankruptcy. However, in accordance with numerous precedents, revocation of respondent's license is appropriate, irrespective of the circumstances of its bankruptcy, and

---

[1](...continued)
weight of authority commands a conclusion that the bankruptcy of a PACA licensee does not impede the complainant's right to proceed in a disciplinary proceeding against it for violations of the Act. *See, e.g., In re Fresh Approach, Inc.*, 49 B.R. 494 (Bankr. N.D. Tex. 1984); and *Melvin Beene Produce v. Agricultural Marketing Serv.*, 728 F.2d 347 (6th Cir. 1984). Further, it should be noted that the Unsecured Creditor's Committee participating in respondent's bankruptcy proceeding sought to file an appearance in this proceeding. Such appearance was rejected as not in accord with the Rules of Practice governing such matters.

irrespective of its excuse for its failure to pay.[2] See, e.g., *In re B.G. Sales Co.*, 44 Agric. Dec. 2021 (1985), attached as an appendix to this decision. In *B.G. Sales Co.*, the following cases should be added to note 3, p. 5:

In re Roman Crest Fruit, Inc., 46 Agric. Dec. ____, slip op. at 5 (Apr. 7, 1987); *In re Anthony Tammoro, Inc.*, 46 Agric. Dec. 173, 175 n.2 (1987).

Also, to note 4, p. 5, add:

In re Wolter Goiley & Sons, Inc., 45 Agric. Dec. 729, 732 (1986); *In re Top Quolity Fruit & Produce Distribs., Inc.*, 45 Agric. Dec. 326, 327 (1986); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2024 (1985); *In re Kaplon's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2018 (1985).

Also, to note 5, p. 5, add:

In re Anthony Tommaro, Inc., 46 Agric. Dec. 173 (1987).

Also, to note 10, p. 9, add:

In re McQueen Bros. Produce Co., 47 Agric. Dec. ___ (Sept. 8, 1988), *appeal docketed*, No. 88-3214 (7th Cir. Nov. 15, 1988).

Also, to note 12, p. 10, add:

In re Ronon Crest Fruit, Inc., 46 Agric. Dec. ____, slip op. at 18-19 (Apr. 7, 1987).

Also, to note 13, p. 11, add:

In re Ronon Crest Fruit, Inc., 46 Agric. Dec. ____, slip op. at 18-19 (Apr. 7, 1987).

Also, to note 14, p. 12, add:

In re Anthony Tammoro, Inc., 46 Agric. Dec. 173, 177 (1987) (nonpayment because of bankruptcy resulting after respondent suddenly lost its largest customer); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2028 (1985)

---

[2]Respondent states (Appeal Brief at 2):

> The corporation filed bankruptcy because it was unable to pay its numerous trade creditors. The major reason for Pirrello's business problems was that an eminent domain taking of its produce packaging facility was announced by the City of Springfield on or about August of 1986. The effect of this announcement was that many of Pirrello's customers were unwilling to trade with the company as they were uncertain as to its future ability to meet their demands. As a result, for a period of several months, Pirrello was unable to conduct sufficient business to meet its debts and was forced to file a Chapter 11 proceeding in Januacy of 1987.

(nonpayment because bank suddenly refused to extend credit as it agreed, and the bank took $50,000 of respondent's funds in the bank's possession); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1246 n. 3 (1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986) (nonpayment because respondent suffered about $200,000 in losses in 2-year period from theft of produce from his warehouse).

And, finally, to note 16, p. 15, add:

In re Carpenito Bros., Inc., 46 Agric. Dec. 486, 489-90 (1987) (delayed payments under color of implied agreements with suppliers), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988) (unpublished; text in WESTLAW).

In addition, in *B.G. Sales Co.*, the following cases cited therein have updated citations as follows:

In re C.B. Foods, Inc., 40 Agric. Dec. 961, (1981), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982)

In re Columbus Fruit Co., 40 Agric. Dec. 109 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982)

In re Cuttone, 44 Agric. Dec. 1573 (1985), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished)

In re Farm Market Serv., Inc., a/t/a FMS, 44 Agric. Dec. 316 (1985)

In re Fava & Co., 46 Agric. Dec. 79 (1984)

In re Food Marketers, Inc., 44 Agric. Dec. 1578 (1985)

In re Gilardi Truck & Transp., Inc., 43 Agric. Dec. 118 (1984)

In re Jarosz Produce Farms, Inc., 42 Agric. Dec. 1505 (1983)

In re Clarence Miller Co., 43 Agric. Dec. 529 (1984)

In re Oliverio, Jackson, Oliverio, Inc., 42 Agric. Dec. 1151 (1983)

In re A. Pellegrino & Sons, Inc., 44 Agric. Dec. 1602 (1985), *appeal dismissed*, No. 85-1590 (D.C. Cir. Sept. 29, 1986)

In re Reeves Produce, Inc., 44 Agric. Dec. 1607 (1985), *aff'd per curiam*, 790 F.2d 163 (D.C. Cir. 1986) (unpublished)

In re Veg-Mix, Inc., 44 Agric. Dec. 1583 (1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987)

Respondent contends that § 4(a) of the Act (7 U.S.C. § 499d(a)) requires the Secretary to determine whether the circumstances of its bankruptcy warrant continuation of its license after its discharge in bankruptcy. That argument was rejected in *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1149 (1981),[3] as follows:

> Respondent also relies on amendments made by the 1978 Bankruptcy law to § 4(a) and (e) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499d(a) and (e)). Prior to the 1978 amendments, § 4(a) provided "That the license of any licensee shall terminate upon said licensee, or in case the licensee is a partnership, any partner, being discharged as a bankrupt." The 1978 amendments added, following the word bankrupt, "unless the Secretary finds upon examination of the circumstances of such bankruptcy, which he shall examine if requested to do so by said licensee, that such circumstances do not warrant such termination" (7 U.S.C. § 499d(a) (Supp. II 1978)).
>
> Prior to the 1978 amendment, the license of a bankrupt licensee terminated automatically even if no PACA violations had occurred. For example, prior to 1978, the license of a broker who handled no funds, a commission merchant who handled other person's funds faithfully, or a dealer who paid all his produce sellers would have terminated automatically upon bankruptcy even though there were no violations of the Perishable Agricultural Commodities Act. Section 4(a), as amended in 1978, gives the Secretary discretionary authority not to terminate a bankrupt's license in appropriate circumstances.
>
> However, § 4(a) of the Act is not involved in the present proceeding. Respondent did not request the Secretary to examine the circumstances of its bankruptcy to determine whether the circumstances did not warrant termination of its license until after the license had already terminated. Therefore, respondent's request under § 4(a) of the Act came too late. Moreover, even if the respondent's request had not come too late, the request would have been acted upon by the administrative officials of the Department, and their determination, in this respect, would not have been reviewable by the Department's Administrative Law Judges or Judicial Officer. The Department's Rules of Practice set forth the specific sections of the Perishable Agricultural Commodities Act which can be involved in proceedings before the Department's Administrative Law Judges and Judicial Officer, and with respect to § 4 of the Act, only proceedings under § 4(d) (7 U.S.C. § 499d(d)) are reviewable by the Department's

In the present case, respondent did not ask the Secretary to examine the circumstances of its bankruptcy under § 4(a) of the Act (7 U.S.C. § 499d(a)) until it filed its appeal from the ALJ's decision. The Secretary's determination dated November 15, 1988, is adverse to respondent (see Addendum to Complainant's Reply to Respondent's Appeal, Appendix A). As stated in *Connecticut Celery,* that determination is not reviewable here. *Accord In re Carlton F. Stowe, Inc.,* 41 Agric. Dec. 1116, 1147 n.17 (1982), *appeal dismissed,* No. 82-4144 (2d Cir. Oct. 13, 1982).

Respondent's argument, that produce creditors will suffer if its license is revoked, was rejected in *In re Gilardi Truck & Transp., Inc.,* 43 Agric. Dec. 118, 142-43 (1984), as follows:

> Respondent argues that it would be detrimental to its creditors if it were forced to discontinue business. Such arguments are frequently made and routinely rejected. Even where creditors of a respondent personally appear to urge the Department to permit the violator to continue in business, so that the violator will be able to make additional payments to the creditors, the Secretary routinely rejects such pleas for lenieney made by creditors since the Secretary must consider the broader public interest, involving thousands of suppliers and licensees throughout the country.[21] If lenient sanctions were imposed in the case of serious and flagrant violations of the Act for the benefit of a few of respondent's creditors, the sanctions would not have a strong deterrent effect and, therefore, such a policy would be contrary to the public interest.
>
> Similarly, under all of the regulatory programs administered by the Department, any hardship to the respondent's community, customers or employees which might result from a disciplinary order is given no weight in determining the sanction, in order to protect the broader public interest, which is best served by imposing severe sanctions for serious or repeated violations, to serve as an effective deterrent to future violations.[22]

---

[21]*In re Oliverio, Jackson, Oliverio, Inc.,* 42 Agric. Dec. [1151, 1170-72 (1983)]; *In re Bananas, Inc.,* 42 Agric. Dec 426, 426-27 (order denying intervention), *final decision,* 42 Agric. Dec. [588, 606 (1983)]; *In re Melvin Beene Produce Co.,* 41 Agric. Dec. 2422, 2441-42 (1982), *[aff'd,* 728 F.2d 347 (6th Cir. 1984)]; *In re V.P.C., Inc.,* 41 Agric. Dec. 734, 746 n.6 (1982); *In re Catanzaro,* 35 Agric. Dec. 26, 34-35 (1976), *aff'd,* No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467.

[22]*In re Powell,* 41 Agric. Dec. 1354, 1365 (1982); *In re Hatcher,* 41 Agric. Dec. 662, 670-71 (1982); *In re Gus Z. Lancaster Stock Yards, Inc.,* 38 Agric. Dec. 824, 825 (1979); *In re Sol Salins, Inc.,* 37 Agric. Dec. 1699, 1737-38 (1978); *In re Arab Stock Yard, Inc.,* 37 Agric. Dec. 293, 302, 311, *aff'd mem.,* 582 F.2d 39 (5th Cir. 1978); *In re Cordele Livestock Co.,* 36 Agric. Dec. 1114, 1128-29, 1136 (1977), *aff'd mem.,* 575 F.2d 879 (5th Cir. 1978); *In re Red*

River Livestock Auction, Inc., 36 Agric. Dec. 980, 989-90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851-52 (1975); and *see In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120-21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978).

Accord In re Rodman, 47 Agric. Dec. ___, slip op. at 1 (Sept. 22, 1988) (order denying reconsideration); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 177-78 (1987); *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 171 (1987), *aff'd*, 831 F.2d 403 (2d Cir. 1987); *In re Garver*, 45 Agric. Dec. 1090, 1097-98, 1104 (1986), *reconsideration denied*, 45 Agric. Dec. 1957 (1986), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 109 S. Ct. 63 (1988); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 623, 636 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987).

Respondent's contention that complainant must prove not only that it failed to pay for produce, but, also, that it failed to account correctly, was rejected in *Marvin Tragash Co. v. USDA*, 524 F.2d 1255, 1258 (5th Cir. 1975). *Accord In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1603, 1605 (1985), *appeal dismissed*, No. 85-1590 (D.C. Cir. Sept. 29, 1986). As stated in Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, § 4.08 (1981):

> It is a violation of § 2(4) of the act for any commission merchant, dealer or broker in any transaction subject to the act "to fail or refuse truly and correctly to account and make full payment promptly."[84] When originally enacted, this clause referred only to failure or refusal "truly and correctly to account promptly,"[85] but the words "and make full payment" were added in 1942[86] as a legislative reversal of a decision by a 3-judge court holding that, under the original language, it was not a violation if a licensee made a proper accounting without making payment.[87]

---

[84]7 USC §499b(4).

[85]7 USC §499b(4) (1940).

[86]Act of April 6, 1942, Pub L No 516, 56 Stat 200.

[87]H.R. Rep No. 1840, 77th Cong, 2d Sess 1-2 (1942); S Rep No 1188, 77th Cong, 2d Sess 1-2 (1942); and *see* Marvin Tragash Co v USDA, 524 F2d 1255, 1258 (5th Cir 1975).

For the foregoing reasons, the following Order should be issued in this proceeding.

Order

The license of respondent John A. Pirrello Co., Inc., is hereby revoked.

This Order shall take effect on the 30th day after service of this Order on respondent.

APPENDIX

In re B.G. Sales Co., 44 Agric. Dec. 2021 (1985).

In re: JOHN A. PIRRELLO CO., INC.
PACA Docket No. D-88-524.
Order Denying Petition for Reconsideration filed March 20, 1989.

Edward M. Silverstein, for Complainant.
Paul R. Salvage, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

Respondent's Petition for Reconsideration is denied for the reasons previously set forth in the Decision and Order and in Complainant's Response to Respondent's Petition for Reconsideration.

In re: H. M. SHIELD, INC.
PACA Docket No. 2-7660.
Decision and Order filed February 16, 1989.

Failure to make full payment promptly - Failure to testify results in adverse interest - Willful defined.

The Judicial Officer affirmed Chief Judge Palmer's order finding that respondent has committed flagrant and repeated violations of Section 2 of the Act by failing to make full payment promptly of the net proceeds of $68,447.97 collected as a grower's agent, but not paid to the supplier, and failing to make full payment promptly to 28 sellers for 313 lots of produce from November 1985 through March 1986, totaling $356,213.60. A large portion of these sums remains unpaid. The evidence supports the finding that the transactions were in interstate commerce. Adverse interest drawn against respondent because it did not have an officer or employee testify as to whether the transactions were in interstate commerce. Willful defined. The same order would be entered as long as the violations are not *de minimis*.

Ben E. Bruner, for Complainant.
Stephen P. McCarron, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

full payment promptly of the net proceeds of $68,447.97. The complaint further alleged that respondent additionally violated § 2 of the PACA by failing to make fully payment promptly of agreed purchase prices for 313 lots of perishable agricultural commodities, for a total of $356,213.60. Respondent filed an answer on September 25, 1987, in which it denied violating the PACA.

Oral hearing was held before me on March 14, 1988, in Fort Lauderdale, Florida. Complainant was represented by Ben E. Bruner, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250. Respondent was represented by Stephen P. McCarron, Esquire, Silver Spring, Maryland 20910. Complainant produced one witness, respondent produced none and did not personally attend the hearing or give testimony. Briefing was completed on March 28, 1988.

Upon consideration of the record evidence, the proposed findings and conclusions filed by the parties and their supporting briefs, an order is being entered publishing the facts which show that respondent repeatedly and flagrantly violated the PACA.

Pertinent Statutory Provisions

(7 U.S.C. § 499b) of the PACA reads as follows:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce--

* * * * *

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction;

* * * * *

(7 U.S.C. § 499d(a)) of the PACA reads as follows:

(a) Whenever an applicant has paid the prescribed fee, the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter,

or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on any anniversary date thereof unless the annual[1] fee bas been paid: *Provided*, Tbat notice of the neccssity of paying the annual fee shall be mailed at least thirty days hefore thc anniversary date: *Provided, further,* That if the annual fee is not paid hy the anniversary date, the licensce may obtain a renewal of that license at any time within thirty days of paying the fee provided in section 499c(h) of this title, plus $5, which shall be deposited in the Perishahle Agricultural Commodities Act fund provided for hy section 499c(b) of this title: *And provided further,* That the license of any licensee shall terminate upon said licensee, or in case the licensee is a partnership, any partner, being discharged as a hankrupt, unless the Secretary finds upon examination of the circumstances of such bankruptcy, which he shall examine if requested to do so hy said licensee, that sucb circumstances do not warrant such termination;

---

[1]So in original. Probably should read "annual".

(7 U.S.C. § 499h(a)) of tbe PACA reads as follows:

(a) Whenever (a) tbe Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer or broker has violated any of tbe provisions of section 499b of this title, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may puhlish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, thc Secretary may, by order, revoke the license of the offender;

(7 U.S.C. § 499a(8)) of the PACA reads as follows:

(8) A transaction in respect of any perishable agricultural commodity shall he considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within thc above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from sucb processing. Commoditics normally in sucb current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter.

Pertinent Regulations

(7 C.F.R. § 46.2(aa)) reads as follows:

"Full payment promptly" is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

* * * * *

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

* * * * *

Findings of Fact

1. Respondent is a Florida corporation whose address is State Farmers Market, Room B4, Pompano Beach, Florida 33060.
2. Pursuant to the licensing provisions of the PACA, license number 690776 was issued to respondent on October 29, 1969. This license terminated on October 29, 1986, because respondent failed to pay the annual fee.
3. During the period January through April 1986, respondent, acting as a grower's agent for one supplier, International Agri-Management, Ltd., Kingston, Jamaica, W.I., received and accepted 54 lots of perishable agricultural commodities in foreign commerce, sold them and collected the proceeds realized therefrom, but violated § 2(4) of the PACA (7 U.S.C. § 499b(4)), by failing to account and to make full payment promptly of the agreed net proceeds of $68,447.97.
4. During the period November 1985 through March 1986, respondent purchased, received and accepted 313 lots of perishable agricultural commodities from 28 sellers in interstate commerce, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $356,213.60.

. . . . [Finding 5 omitted.]

Conclusion

The acts of respondent in acting as a grower's agent and failing to account and make full payment promptly for the proceeds collected as alleged in paragraph 5 of the complaint and in failing to make full payment promptly of the agreed purchase prices for the 28 lots of perishable agricultural commodities it purchased, received, and accepted, as more specifically alleged in paragraph 6 of the complaint, constitute willful, flagrant and repeated violations of § 2 of the PACA (7 U.S.C. § 499b).

Discussion

The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. S2163 (May 29, 1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers and brokers. H.R. Rep. No. 1041, 71st Cong., 2d Sess. (1930). Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities.[1] *Chidsey v. Guerin*, 443 F.2d 584 (6th Cir. 1971); *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976). "Accordingly, certain conduct by commission merchants, dealers, or brokers [was] declared to be unlawful. 7 U.S.C. § 499b." *Id.* at 858. Enforcement is effectuated through a system of licensing with penalties for violation. H.R. Rep. No. 1041, 71st Cong., 2d Sess. (1930). *See, also, George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

The instant proceeding is such an enforcement action. Our first duty in such a proceeding is to determine whether respondent violated § 2(a) of the PACA (7 U.S.C. § 499b(a)). Upon making such a determination, we must then further determine what is the appropriate sanction which need be imposed.

(A) Respondent's violations of the PACA.

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful, *inter alia*, for any commission merchant, dealer, or broker[2] to fail to "make full payment promptly" of its obligations respecting transactions involving perishable agricultural commodities made in interstate commerce. "Full payment promptly" is defined by the Department's Regulations (7 C.F.R. § 46.2(aa)(5)) as requiring payment of the agreed purchase prices for produce within 10 days after the day the produce was accepted.

The complaint alleged that respondent violated the PACA and the Regulations by failing to account and make full payment of agreed net proceeds from the sale of imported Jamaican produce of $68,447.97 in

respondent supplied. The uncontroverted evidence is that the respondent entered into an arrangement with International Agri-Management, Ltd., Kingston, Jamaica, W.I., whereby respondent accepted on an agency basis, 54 lots of fruits and vegetables that had been shipped from Jamaica to Florida. The terms of this arrangement were set forth in a contract executed by the respondent and International Agri-Management, Ltd., Kingston, Jamaica, W.I. By the terms of the contract, the respondent was to sell the goods and remit "any and all revenues due, upon collection of receiving said from each trailer lot or twenty-one (21) days after receipt less any fees or commission due. . . ."

Bruce Summers, the Department's investigator, testified that he discussed these transactions with Mr. Shield of respondent's firm. Mr. Shield admitted that $66,000.00 was past due to the Jamaican firm. Mr. Summers' audit showed significantly more to be past due, however, certain amounts were disputed by Mr. Shield and therefore discounted by Mr. Summers. After subtracting the disputed amounts, Mr. Summers arrived at a figure of $68,447.97 as past due and owed to the Jamaican firm. Mr. Summers reviewed the entire file containing the various transactions involving this firm and verified that the respondent had in fact received payment for the sale of the Jamaican fruits and vegetables. He also reviewed the bills of lading for those transactions which showed that each of the 54 lots was shipped from Jamaica to Florida, thereby proving the transactions were in interstate commerce.

Further, the record is clear that a claim was filed by International Agri-Management, LTD, Kingston, Jamaica, W.I. pursuant to the PACA trust provision under 7 U.S.C. § 499. In effect, the bankruptcy court found that $128,620.06 was then owed as a result of the respondent's failure to pay the Jamaican firm on transactions subject to the PACA.

Respondent's only defense to the remaining substantive allegations contained in paragraph 6 of the complaint involves the issue of interstate commerce. The evidence regarding nonpayment is uncontroverted. The USDA investigator, Bruce Summers, asked Mr. Shield for his unpaid and past due invoices. Mr. Shield directed him to a file drawer where they were maintained. Mr. Summers then reviewed these records, copied all the unpaid and past due invoices, and prepared a schedule of the transactions. The respondent has made no effort to prove that any of these transactions have been paid.

Respondent, however, argues that complainant's proofs were insufficient to establish that these transactions were in interstate commerce and subject to the PACA.

Complainant presented several types of evidence to show the produce was in interstate commerce as defined by the PACA. First, 33 transactions involved invoices which indicate the commodities were purchased by the respondent from a California company. These transactions alone total $57,095.90. The investigator testified that the California company, "Cal Fruit" did not have a Florida office and therefore did not sell Florida produce to other Florida firms. Respondent sought to refute this with evidence that Cal-Fruit was owned by a Florida company. That fact has no bearing on the

interstate commerce issue. The Cal-Fruit invoices indicate that the payment was to go to California. Complainant points out that it would he illogical for a company to sell local goods and have payment for those goods sent to a subsidiary 3,000 miles away. Moreover, complainant argues, the various fruits and vegetables bought from Cal-Fruit are of a kind produced in California and there is no reason why they wouldn't be shipped to Florida if there was sufficient demand in Florida. More important than these contentions is the fact that respondent could have set the record straight by having one of its knowledgeable officers take the stand and give clarifying testimony. It chose not to do so and this is an appropriate case for drawing an adverse inference against respondent that its sworn testimony would have been against its position and would have confirmed the allegations of the complaint. *See, Cattleman's Commission Company*, 45 Agric. Dec. 234, 255-56 (1986).

And there was more evidence that respondent's transactions were in interstate commerce.

Mr. Summers stated that the "Costa Caribe" melons purchased by the respondent would likely have come from Costa Rica. The transactions included purchases of pineapples which the witness advised are not grown in Florida and must have originated outside the State. Various of the invoices clearly showed that the respondent shipped some of the produce out of State to Washington, D.C. Still other invoices showed shipment of Kalek, a firm located outside Florida. A total of 23 lots amounting to $28,845.35 were thus specifically identified by respondent's own documents to have been in interstate commerce.

Mr. Summers also testified that over half of the respondent's accounts payable were to firms outside the State of Florida. He further testified that based on his experience in dealing with the Pompano Beach market, many of the sales to other firms on that market by Shield were made to enable those other firms to fill orders outside of the State.

The evidence establishes by much more than the needed simple preponderance, that a substantial number of the transactions listed in paragraph 6 of the complaint were in interstate commerce. The respondent made no effort to rehut this evidence other than through cross-examination of complainant's witness.

Respondent's failures to make timely payment, as alleged in the complaint, are clearly in violation of the prohibitions of § 2 of the PACA (7 U.S.C. § 499h). *Atlantic Produce Co.*, 35 Agric. Dec. 1631 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir), *cert. denied*, 439 U.S. 819 (1978).

Moreover, the numerous violations committed by respondent constitute flagrant and repeated violations of the PACA. Even if some of the transactions alleged in the complaint were not in interstate commerce, those proven to have been are more than sufficient to show repeated and flagrant violations. The proven transactions include:

1. International Agri-Management, Ltd. Kingston, Jamaica, W.I. (Clearly in interstate commerce and in violation of the PACA as seen in the bankruptcy order, CX 7 and as testified to by Mr. Summers)--54 lots for $68,447.97;
2. Cal-Fruit Brand, Los Angeles, California--33 lots for $57,095.90; and
3. Assorted invoices--23 lots for $28,845.35.

In fact, the Jamaican transactions above (International Agri-Management, Ltd, Kingston, Jamaica, W.I.) by virtue of the bankruptcy order suffices to establish liability including the repeated and flagrant nature of the violations. *See, Veg-Mix, Inc. v. USDA,* [832 F.2d 601] (D.C. Cir. 1987).

Furthermore, these violations can be said to be willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *Henry S. Shatkin,* 34 Agric. Dec. 296 (1975); *G. Steinberg & Son, Inc., supra,* 32 Agric. Dec. 236, 263-69; *Goodman v. Benson,* 286 F.2d 896 (7th Cir. 1961).

(B) Sanction

As sanction in this matter, complainant has requested that the facts and circumstances of the violations be published. This sanction is appropriate in light of the repeated and flagrant violations and the fact that the respondent is not now licensed by PACA.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends that the evidence does not adequately support the ALJ's findings of fact, but there is much more than a preponderance of the evidence, which is all that is required.[3] Moreover, there is no need for complainant to prevail as to each of the transactions, since the same order would be entered in any event, as long as the violations are not *de minimis*. *In re Veg-Mix, Inc.*, 44 Agric. Dec. 2060, 2060 (1985) (order denying reconsideration), *aff'd and remanded,* 832 F.2d 601 (D.C. Cir. 1987).

Respondent further contends that the ALJ erred in drawing an adverse inference against respondent because no one testified on behalf of the respondent, and respondent offered no evidence contrary to that offered by complainant. Under the settled principle that has been followed in many proceedings before this Department,[4] and which has also been followed in

---

[3] *See Herman & MacLean v. Huddleston,* 459 U.S. 375, 387-92 (1983); *Steadman v. SEC,* 450 U.S. 91, 92-104 (1981); *In re Rowland,* 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd* 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd,* No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

[4] *E.g., In re Great American Veal, Inc.*, 48 Agric. Dec. ___, slip op. at 52-54 (Jan. 19, 1989); *In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. ___ (Aug. 13, 1987); *In re Corn State Meat Co.*, 45 Agric. Dec. 995 (1986); *In re Farmers & Ranchers Livestock Auction, Inc.*, 46 Agric.

(continued...)

many judicial proceedings,[5] the ALJ properly inferred that respondent's testimony would have been adverse to respondent's interests here. "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contracted." Lord Mansfield, in *Blatch v. Archer*, Cowp. 63 quoted with approval in Wigmore, *Evidence* § 285 (3d ed. 1940).

For the foregoing reasons, the following Order should be issued.

Order

A finding is hereby made that respondent committed flagrant and repeated violations of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b).

The facts and circumstances as set forth herein shall be published.

---

[4](...continued)
Dec. 234 (1986); *In re Grady*, 45 Agric. Dec. 66 (1986); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. 1886 (1985); *In re Saylor*, 44 Agric. Dec. 2238 (1985) (decision on remand); *In re Petty*, 43 Agric. Dec. 1406 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. Dec. 19, 1984); *In re Jarco Produce Farms, Inc.*, 42 Agric. Dec. 1505 (1983); *In re Farrow*, 42 Agric. Dec. 1397 (1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985) (merits affirmed; suspension reversed); *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 101-02, *aff'd*, 721 F.2d 1125, 1130 (7th Cir. 1983); *In re Stamper*, 42 Agric. Dec. 20, 32 n.4 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1981); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 402-03 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1507 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 716 (1983), *aff'd*, No. CV 81-6485 (Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1363-64 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979); *In re Wilcox*, 37 Agric. Dec. 1659, 1666-67 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 Agric. Dec. 570, 586-87 (1977), *aff'd*, 570 F.2d 724 (8th Cir.) (2-1 decision), *cert. denied*, 436 U.S. 957 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 305, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Burrus*, 36 Agric. Dec. 1668, 1686-87 (1977), *aff'd per curiam*, 575 F.2d 1258 (8th Cir. 1978); *In re DeJong Packing Co.*, 39 Agric. Dec. 607, 637-38 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert denied*, 449 U.S. 1061 (1980); *In re Loretz*, 36 Agric. Dec. 1087, 1100-01 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1558 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert denied*, 435 U.S. 968 (1978); *In re Whaley*, 35 Agric. Dec. 1519, 1522 (1976); *In re Casca*, 34 Agric. Dec. 1917, 1929-30 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1571-72 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 514 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Speight*, 33 Agric. Dec. 280, 300-01 (1974); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 499 (1972).

[5]2 Wigmore, *Evidence* §§ 285-91 (3d ed. 1940); *United States v. Di RE*, 332 U.S. 581, 593 (1948); *Interstate Circuit v. United States*, 306 U.S. 208, 225-27 (1939); *Kirby v. Tallmadge*, 160 U.S. 379, 383 (1896); *Karavos Compania, Etc. v. Atlantica Export Corporation*, 588 F.2d 1, 9-10 (2d Cir. 1978); *International Union v. NLRB*, 455 F.2d 1357, 1362-70 (D.C. Cir. 1971); *Milbank Mut. Ins. Co. v. Wentz*, 352 F.2d 592, 597 (8th Cir. 1965); *Cromling v. Pittsburg & Lake Erie R.R. Co.*, 327 F.2d 142, 148-49 (3d Cir. 1963); *Hoffman v. CIR*, 298 F.2d 784, 788 (3d Cir. 1962); *Illinois Central R.R. Co. v. Staples* 272 F.2d 829, 834-35 (8th Cir. 1959); *Neidhoefer v. Automobile Ins. Co. of Hartford, Conn.*, 182 F.2d 269, 270-71 (7th Cir. 1950); *Bowles v. Lentin*, 151 F.2d 615, 619 (7th Cir.), *cert. denied*, 327 U.S. 805 (1946); *Longini Shoe Mfg. Co. v. Ratcliff*, 108 F.2d 253, 256-57 (C.C. P.A. 1939); *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 867-68 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).

This Order shall take effect on the 30th day after this Decision becomes final.

In re: HAVANA POTATOES OF NEW YORK CORP.
PACA Docket No. D-88-512.
Order Canceling Hearing and Dismissing Complaint filed February 17, 1989.

Edward M. Silverstein, for Complainant.
Leonard Kreinces, for Respondent.
Order issued by Paul Kane, Administrative Law Judge.

By motion filed February 9, 1989, Complainant's counsel moved to dismiss the complaint herein as "the parties. . .have amicably resolved the dispute between them." Complaint counsel did not propose the entry of any disciplinary order. Complaint counsel advised that Respondent does not object to the entry of the requested order.

It appears that counsel have not been particularly sensitive to the requirements of administrative adjudicatory effectiveness nor to the preservation of scarce judicial resources in this case, *McKart v. U.S.*, 395 U.S. 185, 193-195 (1969). Therefore, the complaint is dismissed herein, with prejudice.

The hearing scheduled to commence herein on March 20, 1989, is canceled.

In re: JOE PHILLIPS & ASSOCIATES, INC.
PACA Docket No. D-88-545.
Decision and Order filed April 21, 1989.

Failure to make full prompt payment - Failure to have a license - Seller's agreement to accept partial payment.

The Judicial Officer affirmed Judge Palmer's Decision and Order finding that respondent has committed willful, flagrant and repeated violations of Section 2 of the Perishable Agricultural Commodities Act by failing to make full payment promptly to 23 sellers for 147 lots of produce from July 1987 through December 1987, leaving $73,329.70 unpaid. Where a respondent who does not have a license in effect has failed to pay for produce, a finding is automatically made that respondent has committed flagrant and repeated violations of the Act. Where a seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute full payment, and does not negate a violation of the Act. The exact amount that respondent failed to pay in full is not important since the same order would be entered in any event, as long as the violations were not *de minimis*. Whether the payment that was made was made promptly is irrelevant in view of respondent's failures to make full payment, as required by the Act.

Andrew Y. Stanton, for Complainant.
Jan Lawrence Zagarac, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),[1] in which Chief Administrative Law Judge Victor W. Palmer (ALJ) filed an initial Decision and Order on January 30, 1989, finding that respondent has committed willful, flagrant and repeated violations of § 2 of the Act by failing to make full payment promptly to 23 sellers for 147 lots of produce from July 1987 through December 1987, leaving $73,329.70 unpaid.

On March 6, 1989, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[2] On March 21, 1989, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*, hereinafter "PACA"), instituted by a complaint filed on September 7, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

It is alleged in the complaint that during the period July 1987 through December 1987, respondent purchased from 23 sellers, in interstate commerce, 147 lots of perishable agricultural commodities, but failed to make full payment promptly of a portion of the agreed purchase prices, in the amount of $149,431.36. The complaint further alleged that these actions by respondent were wilful, flagrant and repeated violations of section 2 of the PACA, and requested a finding to that effect be made and published.

On September 21 and September 27, 1988, respondent filed two letters in which it stated that it had made payments to the 23 produce sellers set forth in the complaint, but admitted that it still owed them $73,329.70. On October 24, 1988, respondent filed a formal answer denying non-payment for produce; alleged it was without sufficient knowledge to determine whether the sales enumerated in the complaint were in interstate commerce; and alleged that

---

[1] *See generally* Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 4 (1981 and 1989 Cum. Supp.), and Becker and Whitten, *Perishable Agricultural Commodities Act*, in 10 Harl, Agricultural Law, ch. 72 (1980).

[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

22 of the 23 sellers enumerated in the complaint had been paid. Complainant has filed a Motion for Decision on the pleadings, requesting that since respondent has admitted it failed to pay $73,329.70 owed to 23 produce sellers, it must be found to have committed wilful, flagrant and repeated violations of the PACA, and that, the administrative law judge should publish, without hearing, a finding to that effect, in accordance with 7 C.F.R. § 1.139. Attached to complainant's motion were invoices showing the sales to be interstate in nature. Upon consideration of complainant's motion and respondent's objections to it, the motion is being granted.

Findings of Fact

1. Respondent, Joe Phillips & Associates, Inc., is a corporation whose address is 130 South Myers Street, Los Angeles, California 90033.

2. Pursuant to the licensing provisions of the PACA, license number 820673 was issued to respondent on March 9, 1982. This license had been renewed annually, but terminated on March 9, 1988, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license renewal fee.

3. The Secretary has jurisdiction in this proceeding.

4. As more fully set forth in complainant's complaint and Motion for Decision on the Pleadings and Memorandum in Support Thereof, during the period July 1987 through December 1987, respondent purchased from 23 sellers 147 lots of perishable agricultural commodities, but has failed to make full payment promptly of $149,431.36. Respondent has admitted it still owes $73,329.70 for such purchases.

Conclusion

Respondent has admitted it failed to make full payment promptly for purchases of produce in the amount of $149,431.36, and that it still owes $73,329.70. Respondent's defenses for its nonpayment are not legally sufficient to absolve it under the PACA. *See Veg-Mix, Inc. v. U.S. Dept. of Agriculture*, 832 F.2d 601, 607 (D.C. Cir. 1987). Respondent's admitted failures to make full payment promptly constitute wilful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. § 499b). Accordingly, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Despite respondent's denial in its answer that it owes any money to any produce creditors, the documents filed by respondent show that respondent paid only 1 of its 23 produce creditors in full, and that the other 22 agreed to accept 60 cents on the dollar, in view of respondent's bankruptcy. The amount not paid to the 22 creditors accepting 60 cents on the dollar is $73,329.70. In these circumstances, respondent's license would be automatically revoked, if it had a license, and where, as here, respondent's license is no longer in effect, a finding is automatically made that respondent

has committed flagrant and repeated violations of the Act. See, *B.G. Sales Co.*, 44 Agric. Dec. 2021 (1985), attached as an appen decision. In *B.G. Sales Co.*, the following cases should be added to 5:

In re Roman Crest Fruit, Inc., 46 Agric. Dec. 612, 615 (1987 *Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 175 n.2 (1987).

Also, to note 4, p. 5, add:

In re Walter Gailey & Sons, Inc., 45 Agric. Dec. 729, 732 (1986); *I Quality Fruit & Produce Distributors, Inc.*, 45 Agric. Dec. 326, 327 *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2024 (1985); *In re Kapla & Produce Co.*, 44 Agric. Dec. 2016, 2018 (1985).

Also, to note 5, p. 5, add:

In re John A. Pirrello Co., 48 Agric. Dec. ___ (Jan. 27, 198 *Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. D (Jan. 27, 1989); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 17

Also, to note 10, p. 9, add:

In re McQueen Bros. Produce Co., 47 Agric. Dec. ___ (Sept. *appeal docketed*, No. 88-3214 (7th Cir. Nov. 15, 1988).

Also, to note 12, p. 10, add:

In re John A. Pirrello Co., 48 Agric. Dec. ___ (Jan. 27, 198 *Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. D (Jan. 27, 1989); *In re Roman Crest Fruit, Inc.*, 46 Agric. Dec. 61 (1987).

Also, to note 13, p. 11, add:

In re John A. Pirrello Co., 48 Agric. Dec. ___ (Jan. 27, 198 *Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. D (Jan. 27, 1989); *In re Roman Crest Fruit, Inc.*, 46 Agric. Dec. 61 (1987).

Also, to note 14, p. 12, add:

In re John A. Pirrello Co., 48 Agric. Dec. ___ (Jan. 27 (nonpayment because respondent's customers ceased doing busi respondent when the city announced it was taking respondent's by eminent domain); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. (1987) (nonpayment because of bankruptcy resulting after res suddenly lost its largest customer); *In re B.G. Sales Co.*, 44 Ag

2021, 2028 (1985) (nonpayment because bank suddenly refused to extend credit as it agreed, and the bank took $50,000 of respondent's funds in the bank's possession); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1246 n. 3 (1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986) (nonpayment because respondent suffered about $200,000 in losses in 2-year period from theft of produce from his warehouse).

And, finally, to note 16, p. 15, add:

In re Carpenito Bros., Inc., 46 Agric. Dec. 486, 489-90 (1987) (delayed payments under color of implied agreements with suppliers), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988) (unpublished; text in WESTLAW).

In addition, in *B.G. Sales Co.*, the following cases cited therein have updated citations as follows:

In re C.B. Foods, Inc., 40 Agric. Dec. 961, (1981), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982)

In re Columbus Fruit Co., 40 Agric. Dec. 109 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982)

In re Cuttone, 44 Agric. Dec. 1573 (1985), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished)

In re Farm Market Service, Inc., a/t/a FMS, 44 Agric. Dec. 316 (1985)

In re Fava & Co., 46 Agric. Dec. 79 (1984)

In re Food Marketers, Inc., 44 Agric. Dec. 1578 (1985)

In re Gilardi Truck & Transportation, Inc., 43 Agric. Dec. 118 (1984)

In re Jarosz Produce Farms, Inc., 42 Agric. Dec. 1505 (1983)

In re Clarence Miller Co., 43 Agric. Dec. 529 (1984)

In re Oliverio, Jackson, Oliverio, Inc., 42 Agric. Dec. 1151 (1983)

In re A. Pellegrino & Sons, Inc., 44 Agric. Dec. 1602 (1985), *appeal dismissed*, No. 85-1590 (D.C. Cir. Sept. 29, 1986)

In re Reeves Produce, Inc., 44 Agric. Dec. 1607 (1985), *aff'd per curiam*, 790 F.2d 163 (D.C. Cir. 1986) (unpublished)

In re Veg-Mix, Inc., 44 Agric. Dec. 1583 (1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987)

Respondent contends that it no longer owes any money to the 22 creditors who agreed to take 60 cents on the dollar as a result of respondent's bankruptcy. But it has repeatedly been held that where a seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute full payment, and does not negate a violation of the Act.[3]

Respondent seeks solace in the court's holding in *Marvin Tragash Co. v. USDA*, 524 F.2d 1255, 1258 (5th Cir. 1975), stating:

> The remaining allegations of error are without merit. First, petitioner contends that the written agreement of the creditors to accept 15 per cent of the purchase price under the Chapter XI plan of arrangement satisfied the payment requirement of the Act. This partial payment under the plan entered into some months after the purchasers cannot be characterized as either full or prompt payment as required by the Act, 7 U.S.C.A. § 499b(4).

However, nothing in that decision suggests that payment of more than 15% would have constituted the "full or prompt payment as required by the Act" (524 F.2d at 1258).

Respondent similarly relies on *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 782 (D.C. Cir. 1983), stating:

> The one extenuating circumstance the Judicial Officer did consider was the petitioner's point that the creditors had accepted the insolvency trustees' distribution of seven percent of their claim "in full satisfaction" of those debts. Such a belated payment of a small portion of a licensee's obligation does not constitute the making of the "full payment promptly" that Section 2(4) requires. *Marvin Tragash Co.*, 524 F.2d at 1258.

Here, again, there is nothing in the court's decision in *Finer Foods* to suggest that payment of anything less than 100% of the amount originally owed would constitute the making of the "full payment promptly" required by

---

[3] *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. ____ (Jan. 27, 1989); *In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1603 n. 1 (1985), *appeal dismissed*, No. 85-1590 (D.C. Cir. Sept. 29, 1986); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1250 (1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1163-65 (1982), *aff'd*, 708 F.2d 774, 782 (D.C. Cir. 1983); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1136 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Kafesak*, 39 Agric. Dec. 683, 685 (1980), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (unpublished), *reprinted in* 41 Agric. Dec. 88 (1982); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 413-14 (1980); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 810 (1978); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633, 1639-40 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1884-87 (1975); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 733-40 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1887-88, 1892, 1896, 1899-1900 (1974), *aff'd*, 524 F.2d 1255, 1258 (5th Cir. 1975).

the Act. The administrative decision being reviewed in *Finer Foods* makes it clear that nothing short of 100% payment satisfies the requirements of the Act, notwithstanding an agreement by creditors to accept partial payment in full satisfaction of the debts. The decision of the Administrative Law Judge in *Finer Foods*, which was adopted by the Judicial Officer, states (*In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1164-65 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983)):

> The interpretation of the Act and the policy of the agency in this matter was succinctly set out and reaffirmed in the recent decision of the Judicial Officer in *In re Baltimore Tomato Company, Inc.*, 39 A.D. 412 (1980). In that disciplinary action the sellers *had agreed* in negotiated settlements to accept less than the full purchase of their shipments. A pertinent part of the Decision in that case on pps. 414, 415 states:
>
> > Respondent has failed to make full payments of the agreed purchase prices for produce it accepted and received from 21 sellers in 122 separate transactions. Over $180,000 was left unpaid after the debts were fully discharged under subsequent agreements between respondent and the sellers providing for partial payments.
> >
> > It has been held that although acceptance of a partial payment of the purchase price by a seller under such an agreement fully satisfies and extinguishes the debt, it does not constitute "full payment." In re: M. & H. Produce Co., 34 Agri. Dec. 700, 733-740 (1975), aff'd 549 F.2d 830 (D.C. Cir. 1977), cert. denied, 434 U.S. 920 (1977). [Footnote omitted.]
> >
> > The policy of the Secretary of Agriculture, as established by his delegate, the Judicial Officer, requires license revocation as the inevitable consequence whenever a licensee under the Act fails, for any reason, to make full payment for produce it accepted and received. See In re: M. & H. Produce Co., supra; In re: Sam Leo Catanzaro, 35 Agri. Dec. 26 (1976), aff'd sub nom. Catanzaro v. United States, No. 76-1613, 36 Agri. Dec. 467 (9th Cir. 1977); In re: Hal Merdler Produce, Inc., 37 Agri. Dec. 809 (1978).
> >
> > The invariability of that consequence has been succinctly stated, by the Judicial Officer:
> >
> > > "... the licenses of commission merchants, dealers or brokers who fail to pay for produce have been consistently revoked, or if the firm was not licensed, a finding has been published that the firm has committed flagrant and repeated violations which has the same effect on the firm and on those responsibly connected with the firm as the revocation of a license." (In re: L.R. Morris Produce Exchange, 37 Agri. Dec. 1112, 1119 (1978)).

> Even though a failure to pay in full for produce may be largely due to circumstances beyond a licensee's control, as apparently is the case here, and even though he may be precluded from earning his livelihood in the only business he has known, nevertheless, revocation is uniformly required. See In re: John H. Norman & Sons Distributing Co., Inc., 37 Agri. Dec. 705 (1978); and In re: L.R. Morris Produce Exchange, supra, and the cases cited herein. [Footnote omitted.]

It is irrelevant that respondent denies that its violations were flagrant and repeated since, under the settled precedent set forth above and in *B.G. Sales Co.*, a failure to make full payment (exceeding a *de minimis* amount), because of circumstances peculiar to an individual respondent, is always considered as flagrant and repeated.[4] The exact amount that respondent failed to pay in full is not important since the same order would be entered in any event, as long as the violations were not *de minimis*.[5] As stated in *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1590 (1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987):

> As stated above, in view of respondent's bankruptcy admissions and Complainant's Exhibits 1 and 2, it is clear that there is no material issue of fact that warrants holding a hearing. It is not necessary to show that the undisputed facts prove all the allegations in the complaint. The same order would be issued in this case unless the proven violations were *de minimis*.[3]

---

[3]The violations not specifically challenged in the present proceeding amount to over $70,000.

Similarly, in the order denying reconsideration in *Veg-Mix*, it is stated (44 Agric. Dec. at 2060):

---

[4]As stated in *B.G. Sales Co.*, national considerations, such as "war, 1932 type depression, collapse of the national banking system, etc.," might constitute mitigation to reduce or eliminate a sanction (Appendix at 13-14).

[5]*In re H.M. Shield, Inc.*, 48 Agric. Dec. ____, slip op. at 13 (Feb. 16, 1989) ("there is no need for complainant to prove all as to each of the transactions, since the same order would be entered in

Although the complaint alleges that respondent failed to pay promptly six sellers over $70,000 for 50 lots of perishable fruits and vegetables, the "same order would be issued in this case unless the proven violations were *de minimis*" (Decision and Order at 15-16). Respondent raises no arguments that would have any possibility of reducing the violations to a *de minimis* status and, therefore, detailed discussion of respondent's contentions is not necessary.

The court, in affirming the administrative decision in *Veg-Mix* states (*Veg-Mix, Inc. v. USDA*, 832 F.2d 601, 607-08 (D.C. Cir. 1987)):

B. *The Failure to Hold a Hearing*

1. *Agriculture Department Requirements.* Agriculture Department rules dispense with a hearing when no answer is filed, 7 C.F.R. § 1.139 (1987) [footnote omitted], and Veg-Mix would have us infer from this that under every other circumstance a hearing must occur, regardless of the non-existence of material factual disputes. Since Veg-Mix answered the complaint with a denial of the allegations that some of the transactions were in interstate commerce and denials that some of the transactions were accurately described, it contends that a hearing was required.

This argument strikes us as an utterly implausible application of the ancient maxim *expression unius est exclusio alterius*. Common sense suggests the futility of hearings where there is no factual dispute of substance. Moreover, the agency has previously held that obviously meritless denials and affirmative defenses do not require a PACA hearing, and it placed the burden on the respondent to show a substantial issue requiring a hearing. *In re Fava & Co.*, 44 Agric. Dec. 870 (1985).

The Department's view in *Fava* accords with our rulings that an agency may ordinarily dispense with a hearing when no genuine dispute exists. *See Citizens for Allegan County, Inc. v. Federal Power Commission*, 414 F.2d 1125, 1128 (D.C. Cir. 1969) (Leventhal, J.) ("the right of opportunity for hearing does not require a procedure that will be empty sound and show, signifying nothing"). In *Community Nutrition Institute v. Young*, 773 F.2d 1356, 1364 (D.C. Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 1642, 90 L.Ed.2d 187 (1986), we suggested that a "request for a hearing must contain evidence that raises a material issue of fact on which a meaningful hearing might be held." *See also Cerro Wire & Cable Co. v. Federal Energy Regulatory Commission*, 677 F.2d 124, 128-29 (D.C. Cir. 1982). Thus, we think the agency's approach on the general issue of when a hearing is required was unexceptionable.

Finally, respondent raises the issue of prompt payment agreements, but whether the payment that was made was made promptly is irrelevant in view of respondent's failures to make full payment, as required by the Act.

For the foregoing reasons, the following Order should be issued.

Order

A finding is hereby made that respondent committed wilful, flagrant and repeated violations of the Perishable Agricultural Commoditics Act (7 U.S.C. § 499b).

The facts and circumstances as set forth herein shall be published.

This Order shall take effect on the 30th day after this Decision becomes final.

APPENDIX

In re B.G. Sales Co., 44 Agric. Dec. 2021 (1985).

[This Decision and Order became final April 21, 1989.-Editor]

In re: JOE PHILLIPS & ASSOCIATES, INC.
PACA Docket No. D-88-545.
Stay Order filed May 16, 1989.

Andrew Y. Stanton, for Complainant.
Jan Lawrence Zagarac, for Respondent.
Stay Order issued by Donald A. Campbell, Judicial Officer.

The order previously issued in this case is hereby stayed pending the outcome of proceedings for judicial review.

In re: DAMON'S PRODUCE, INC.
PACA Docket No. D-88-530.
Decision and Order filed May 15, 1989.

Failure to make full prompt payment - Official notice taken of bankruptcy proceeding - Discussion of willful and flagrant violations.

Allan R. Kahan, for Complainant.
Howard R. Haroison, for Respondent.
Decision and Order issued by James Hunt, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; hereinafter referred to as the "Act"), instituted by a complaint filed on May 4, 1988, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period August 1986 through June 1987, respondent, a corporation licensed under the PACA and located in Oklahoma City, Oklahoma, failed to make full payment promptly to 22 sellers of the agreed purchase prices, or balances thereof, in the total amount of $127,182.70 for 65 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate commerce. All but one of the sellers were alleged to be located in states other than Oklahoma. A copy of the complaint was served upon respondent. Respondent filed an answer in which it admitted the jurisdictional allegations but neither admitted nor denied the material allegations in the complaint.

However, the pleadings in this proceeding show that respondent had filed a voluntary petition in bankruptcy on June 8, 1987, in which it admitted owing $123,151.60 to 19 of the 22 sellers referred to in the complaint (Case No. 87-04318A, U.S. Bktcy. Ct., W.D. Okla.). In an affidavit, James R. Frazier, Assistant Chief, PACA Branch, Fruit and Vegetable Division, stated that the bankruptcy petition showed that the amount owed by respondent to the 17 sellers was the same amount as the complaint alleged that he owed to these sellers.

On February 8, 1989, complainant filed a motion to assign a hearing date in this matter, but on March 22, 1989, filed a motion to withdraw its motion for a hearing and to issue a decision based on respondent's admissions in its bankruptcy petition. Complainant argued, *inter alia,* that official notice should be taken of the bankruptcy proceeding and that a decision should be issued finding that respondent engaged in wilful, repeated, and flagrant violations of the Act.

On April 10, 1989, respondent filed objections to complainant's motion. In its objections, respondent admitted that it had committed repeated violations of the Act, but denied that the violations were wilful or flagrant. It contended that either a decision be issued finding that it had engaged in repeated, but not wilful or flagrant violations, or, in the alternative, that a hearing be set in this matter.

Discussion

Official notice is taken of respondent's bankruptcy proceeding and the admissions therein. *Walter Gaily & Sons, Inc.,* 45 Agric. Dec. 729 (1986). In view of respondent's admissions in the bankruptcy proceeding, and its admissions in its objections, it is found that respondent engaged in repeated violations of the Act. As there are no material facts in dispute in this regard, a hearing is not necessary. *Walter Gailey & Sons, Inc., supra.*

The remaining issue is whether respondent's violations were wilful and/or flagrant. In PACA disciplinary proceedings, "an action is wilful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." *B.G. Sales Co., Inc.,* 44 Agric. Dec. 2021 (1985); *H.M. Shield, Inc.,* ___ Agric. Dec. ___ (PACA Docket No. 2-7660, 2/16/89). As respondent has admitted that it did engaged in conduct in violation of the Act, its conduct was intentional or, if not intentional, its

admittedly repeated violations were certainly in careless disregard of the A
Accordingly, respondent's violations are found to be wilful.

Finally, respondent's violations are also found to be flagrant because of t
well-settled precedent that "a failure to make full payment (exceeding a
minimis amount), because of circumstances peculiar to an individu
respondent, is *always* considered as flagrant and repeated" (emphasis added
Joe Phillips & Associates, Inc., ___ Agric. Dec. ___ (PACA Docket No.
D-88-545, 4/21/89).

The amount of payment involved here (over $100,000) far exceeds a
minimis amount. Respondent is therefore found to have engaged in repeate
flagrant and wilful violations of the Act.

Findings of Fact

1. Respondent, Damon's Produce, Inc., is an Oklahoma corporation, whos
business address is 301 South Ellison, Oklahoma City, Oklahoma 7310
(Complaint, ¶ 2)

2. Pursuant to the licensing provisions of the PACA, license number 70156
was issued to respondent on May 15, 1970. This license was renewed annuall
and is next subject to renewal on or before May 15, 1988. (Complaint, ¶ 3

3. The Secretary has jurisdiction over respondent and the subject matte
involved herein.[1]

4. During the period August 1986 through June 1987, respondent failed t
make full payment promptly to 19 sellers of the agreed purchase prices, o
balances thereof, in the total amount of $123,151.60 for perishable agricultura
commodities purchased, received and accepted in interstate commerce.

Conclusion

Respondent has committed wilful, flagrant, and repeated violations o
Section 2 of the PACA (7 U.S.C. § 499b), by failing to make full paymen
promptly with respect to the transactions set forth in Finding of Fact No. 4
above, for which the Order below is issued.

Order

Respondent's license is revoked.

This Order shall become final without further proceedings 35 days after
service unless appealed to the Judicial Officer within 30 days after service.

[This Decision and Order became final July 10, 1989.-Editor]

---

[1]This finding is based on respondent's admission that the Secretary has jurisdiction in this
matter. It is also based on respondent's admission in the bankruptcy proceeding that the sellers
involved were located in states other than Oklahoma. It is therefore inferred that the
commodities shipped to respondent were in interstate commerce.

In re: KIMBALL'S PRODUCE OF OKC, INC.
PACA Docket No. D-89-508.
Motion To Dismiss filed May 16, 1989.

Edward M. Silverstein, for Complainant.
Jeffrey A. Knishkowy, for Respondent.
Motion to Dismiss issued by Victor W. Palmer, Chief, Administrative Law Judge.

Upon complainant's motion, the complaint filed herein shall be dismissed.

In re: VEG-MIX, INC.
PACA Docket No. 2-6612.
Decision and Order filed May 19, 1989.

Flagrant and repeated violations - "Reasonably connected" - Modification of written terms in sales agreement.

Case was remanded for a determination whether violations reached the "flagrant and repeated" level before the director ceased to be "reasonably connected" to the firm. It was held that they did. Flagrant and repeated violations within the meaning of the Act explained. Party who contends that written terms of a sales agreement were later modified incurs the burden of proof which is best satisfied with documentation.

Edward M. Silverstein, for Complainant.
John M. Himmelberg and Mitchell H. Stabbe, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

This disciplinary proceeding has been remanded by the United States Court of Appeals for the District of Columbia Circuit "for the agency to decide whether Veg-Mix's violations reached the 'flagrant or repeated' level before Harris ceased to be 'responsibly connected' to the firm." *Veg-Mix, Inc. v. U.S. Department of Agriculture,* 832 F.2d 601, 608 (D.C. Cir., Oct. 30, 1987). The Court also remanded the case of Charles Harris who had appealed the finding by the Department's presiding officer in a separate proceeding, that Mr. Harris was "responsibly connected" with Veg-Mix, Inc., the corporate respondent.

At the core of the remand orders is the Court's conclusion that Mr. Harris' responsible connection with Veg-Mix ended when he resigned as one of its directors in late March or early April, 1983. *Id*, at 612-614. The Court stated, at 614:

> "In sum, we find that substantial evidence supports the finding that Harris was initially a director of Veg-Mix, but not the finding that he continued to be a director (or responsibly connected person) after his resignation. At the time of the resignation, only a few of the transactions had taken place - the ones with Syracuse & Jenkins. Both because of their quantity and the newly offered evidence that they were open to legitimate dispute at the time, there is reason to doubt that they constitute repeated or flagrant transactions for purposes of § 499h(a). If they do not, then

Harris would face no penalties as a responsibly connected person. We therefore remand Harris' case to await the agency's decision in Veg-Mix."

The Court's remand order was first considered by the Judicial Officer who stated his belief that "it would be inappropriate to consider newly discovered evidence" and his disagreement with "the court's dicta" that in these circumstances the agency might well wish to consider otherwise untimely evidence. Nonetheless, instead of making the determination himself on the basis of existing policies, he remanded the case to me.

By doing so, the Department's duty to be responsive to the Court's order became mine.

In order to properly fulfill this duty, I believed it was necessary to take evidence on whether any of Veg-Mix's purchase transactions with Syracuse & Jenkins were in dispute at the end of March or early April 1983. My decision to take such evidence was discussed with counsel for the parties in a telephone conference held on November 4, 1988.

During the conference, it was decided that the hearing would be held on March 7-8, 1989. I further decided that since the existing evidence of record proved Veg-Mix failed to pay for produce in seven identified transactions, Veg-Mix would have the burden of persuasion to establish which of the transactions were in dispute and when the dispute ended.

A summary of the telephone conference was prepared and filed as part of the record, on November 7, 1988.

On January 27, 1989, respondent filed a request for the issuance of subpoenas for testimony from various witnesses. The proposed witnesses included the Administrator of the Department's Agricultural Marketing Service and four of his subordinates from whom respondent proposed to elicit testimony respecting the Department's general enforcement and sanctioning policies under the Perishable Agricultural Commodities Act (PACA), and their specific decisions respecting the institution and possible resolution of this particular proceeding against Veg-Mix. On February 15, 1989, I ruled that those officials would not be subpoenaed as the proposed evidence would go far beyond the limited purpose of the hearing as framed in the pre-hearing summary.

The oral hearing was held on March 6, 1989, in Miami, Florida. Complainant was represented by its attorney, Edward M. Silverstein. Respondent was represented by its attorneys, John M. Himmelberg and Mitchell H. Stabbe of Holland & Knight.

At the conclusion of the hearing, the parties were directed to file simultaneous briefs on April 20, 1989. The parties complied and briefing was completed on that date.

For the reasons, hereinafter discussed, I have concluded that Veg-Mix's violations reached both the repeated and flagrant levels before Mr. Harris ceased to be responsibly connected to the firm.

The Pertinent Transactions

ıe parties have agreed that the following seven transactions in which Veg- purchased produce from Syracuse & Jenkins are the pertinent ones under remand order:

ntity and modity	Invoice Date	Date Payment Due Per Invoice	Purchase Price
ctns-squash	2-14-83	2-24-83	$ 926.55
ctns-cucumbers	2-25-83	3-07-83	3,360.00
ctns-squash & cucumbers	2-28-83	3-10-83	1,254.40
ctns-squash	3-15-83	3-25-83	2,365.00
ctns-squash	3-18-83	3-28-83	1,069.35
ctns-squash & beans	3-22-83	4-01-83	1,029.00
ctns-squash	3-24-83	4-03-83	1,780.00
TOTAL.....			$11,784.30

The Evidence That The Transactions Were In Dispute At the End of Mnrch or Early April 1983.

)ver complainant's objections, evidence was received from three witnesses led by respondent to show the transactions were in dispute.

Two witnesses, a former bookkeeper and respondent's former accountant, tified that Syracuse & Jenkins owed Veg-Mix more for produce purchased n was owed to Syracuse & Jenkins for produce purchases by Veg-Mix, and t, as of March 31, 1983, Veg-Mix's records showed an open account payable Syracuse & Jenkins of $12,059.70 and an open account receivable from racuse & Jenkins of $36,286.10.

:. Gary Syracuse testified that he had handled all of Syracuse & Jenkins es and purchases of produce from Veg-Mix in 1983. He testified that racuse & Jenkins has been out of business for three years and its pertinent cords were destroyed. His recollection of the details of the transactions with g-Mix was most limited. He recalled that Syracuse & Jenkins had rchased produce from Veg-Mix produce before Veg-Mix purchased produce)m Syracuse & Jenkins.

Mr. Syracuse stated he believed that the eight transactions specified in his idavit of November 10, 1987, correctly identified those sales to Veg-Mix, mely:

Date of Agreement	Agreed Purchase Price
2-14-83	$ 926.55
2-25-83	3,360.00
2-28-83	1,254.40
3-15-83	2,365.00
3-18-83	1,069.35
3-22-83	1,029.00
3-24-83	1,780.00
4-21-83	320.00
5-09-83	256.40
TOTAL.....	$12,360.70

Mr. Syracuse's recollection was that Veg-Mix had disputed the amount owed Syracuse & Jenkins for produce in each of the seven pertin transactions, just as Syracuse & Jenkins had disputed the amounts it owed its earlier produce purchases from Veg-Mix. He also testified that althou Syracuse & Jenkins' invoices to Veg-Mix in each of the seven transactic specified "all invoices due within ten days," the two firms had an o agreement not to seek payment from each other for thirty days. He furt testified that he had agreed with Veg-Mix's Larry Watkins that neit company would expect payment on its produce sales to the other, until all disputes between them were resolved, and this resolution was accomplished until May 1983.

C. The Date Mr. Harris Resigned.

The Court's remand order directed the examination of all of Veg-Mi purchase transactions from Syracuse & Jenkins through late March and ea April 1983.

Respondent, however, sought to introduce evidence showing that the d of Harris' resignation was in fact March 19, 1983, and that only the transactio due on that date should be used for the determination to be made under t remand order. I sustained complainant's objection to the proffered eviden as exceeding my jurisdiction in this proceeding. However, it is found that o the first three of the seven transactions would be included if March 19, 19 were the end date of the examination and that the total of those thr purchases amounted to $5,540.55.

Conclusion

Respondent, Veg-Mix, Inc., had committed repeated and flagrant violatio of the PACA by late March/early April 1983. Additionally, respondent, Ve Mix, Inc., had committed repeated and flagrant violations of the PACA by t proposed earlier date of March 19, 1983.

Discussion

Relevant decisions hold that a finding of *repeated* violations is appropriate whenever there is more than one violation of the Act. *Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1640 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978).

Others hold that whenever the total amount due and owing for produce exceeds $5,000, an order should be entered finding the indebted produce dealer to have committed a *flagrant* violation of the Act. *Fava & Co.*, 46 Agric. Dec. 79, 81 (1984). *See also*, recent slip opinions in *Joe Phillips & Associates, Inc.*, (April 21, 1989, at 10); and *H.M. Shield, Inc.*, (Feb. 16, 1989, at 13).[1]

Persons responsibly connected with a PACA license are completely barred from industry employment for one year and may only be employed the following year if suitably bonded, whenever *either* finding is entered against the licensee.

Here, both findings would be required if this determination were made as of April 3, 1983, when $11,184.30 was owed on seven transactions, and if it were made as of March 19, 1983, when $5,540.55 was owed as to three of them.

In order to assure responsiveness to the Court's remand order, respondent was permitted to introduce evidence to prove those sums were not due and owing on the critical dates.

Its evidence failed to comply with the regulation that controls variances from the stated times within which there must be "full payment promptly." The regulation, 7 C.F.R. § 46.2(aa)(11), provides:

> (11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly," *Provided*, That the party claiming the existence of such an agreement for the time of payment shall have the burden of proving it.
>
> * * * *
>
> If there is a dispute concerning a transaction, the foregoing time periods for prompt payment apply only to payment of this undisputed amount.

The closing language respecting disputes must be read within the context of the regulation and its customary applications.

Firstly, the regulations treat each transaction as a matter of individual concern. There is no known Departmental precedent for treating prior amounts owed to the buyer by the seller as a set-off changing the time when

---

[1]The slip opinions make clear that in accordance with *Fava supra*, a total unpaid amount exceeding $5,000, will still not be considered *de minimis*.

the buyer must pay for individual lots of produce. Within the context of the regulation, delaying the payments beyond the requisite ten days for this reason or any other, constitutes "different times of payment" which must be reduced to "writing before entering into the transaction." There was no written agreement of this kind and the parties oral understanding in this respect and their oral agreement to accept payment within 30 days of shipment as timely, fail to meet the regulation's clear command.

The remaining evidence introduced by respondent to prove payments were not due and owing ten days from the invoice date, consisted of Gary Syracuse's testimony that all seven of the transactions were disputed by Veg-Mix after arrival of the produce, as to the entire amount owed on each transaction because the produce showed "decay, some old, generally bad produce."

If a licensee could extend his time for making payment after receiving produce by merely telling the shipper he disputed the entire amount owed, then the essential purpose of the regulation would be vitiated.

It is important to note that this regulation is one of a large body of regulations which seek to clarify the duties owed by PACA licensees to each other, to their customers and to the public. These regulations are typically applied to settle the disputes the Department must decide in the many reparation cases licensees elect to file with it each year.

A review of the decisions entered by the Judicial Officer in those cases shows that the party who contends the written terms of a sales agreement were later modified or became the subject of a dispute, incurs the burden of proof which he best satisfies with documentation. For example, in *Mutual Vegetable Sales v. Select Distributors,* 38 Agric. Dec. 1359, 1361-1362 (1979), a case frequently cited in subsequent reparation proceedings, the Judicial Officer held against a purchaser who argued a modification had been made to an agreement on account of the poor condition of the produce delivered:

> "Respondent (the purchaser) accepted the lettuce. . .by unloading lettuce from the truck and therefore became liable for the purchase price thereof less any damages resulting from any breach of contract by complainant (the seller). The burden of proving both breach and damages resulting therefrom rest on respondent (the purchaser)."

In that case, the Judicial Officer held that the purchaser's evidence of subsequent telephone conversations was insufficient proof of subsequent contract modification and that the purchaser had failed to prove the contract was breached on account of the produce's poor condition.

> "We have often discounted testimonial evidence concerning the condition of perishable commodities and stated the necessity of obtaining a neutral inspection showing the exact extent of damages. *See G. J. Albert, Inc. v. Salvo,* 36 Agric. Dec. 240 (1977); *Salt Lake Produce Co., Inc. v. Butte Produce Company, Inc.,* 32 Agric. Dec. 1732 (1973); *B.G. Anderson Company, Inc. v. Mountain Produce Co.,* 29 Agric. Dec. 513 (1970)."

Obviously, respondent's evidence consisting of undocumented testimony of oral modifications of the invoices' terms, and of unspecified disputes respecting the condition of the produce received in each of the seven transactions, would not be sufficient to defend it from a claim asserted by the seller in a reparation proceeding before the Department.

In the instant case, however, the only evidence on this subject was testimony by the seller's representative. But his testimony is not credible.

Because of the requirements of the regulations, because of the highly regulated nature of the produce industry, because of the necessity of accounting with precision to consignors, customers, and government investigators, and because of the sheer volume of the various types of transactions conducted, licensees necessarily document their disputes.

Mr. Syracuse is no longer employed in the produce business. His father's business, Syracuse & Jenkins, ended three years ago. Those business records were destroyed. When he testified, he had no independent recollection of the specifics of the firm's sales transactions to Veg-Mix, other than those recorded on the affidavit he gave Veg-Mix's accountant in 1987 - three years after the transactions and two years before he testified. Undoubtedly, Mr. Syracuse felt sympathy for Mr. Harris' plight. His affidavit and later his testimony, were given to help Mr. Harris in circumstances where negative business consequences were no longer possible.

My major problem with accepting his testimony is that disputes concerning the condition of produce shipped typically result in a federal inspection of the produce. If not at the time of the first shipment of unacceptable produce, certainly by the time of the second, more certainly by the third, even more certainly by the fourth, even more certainly by the fifth, even more certainly by the sixth, and most assuredly by the seventh shipment, Veg-Mix would have asked for federal inspection to document decayed produce. But apparently federal inspection was never sought by Veg-Mix. No inspection certificate was produced by those who had custody of Veg-Mix's records or was recalled by those who kept its records.

Moreover, contrary to Mr. Syracuse's testimony, when a dispute arises on account of the condition of the produce shipped, only payment on that portion of the amount invoiced for the shipment believed to be below grade or spoiled, may be withheld until the dispute is settled - the rest must still be paid in ten days under the regulation.

I simply do not believe that the entire amount invoiced in each of the seven transactions was disputed.

Accordingly, I do not find that there is sufficient credible evidence to meet respondent's burden of persuasion that in no more than one of the transactions was there any money due and owing on the critical dates, and that the total owed on those dates was no more than $5,000.

[This Decision and Order became final July 6, 1989.-Editor]

In re: THE CAITO PRODUCE CO.
PACA Docket No. D-88-511.
Decision and Order filed June 1, 1989.

Payment terms - Requirement of written agreement - Requirement for hearing on the record - Explanation for license revocation - "Willfulness."

The Judicial Officer reversed Judge Kane's order, which suspended respondent's license for 30 days for failure to make full payment promptly to 24 sellers for 44 lots of produce from August 1986 through February 1987, totaling $124,197.09, but suspended that order during those times that the respondent is in full compliance with the Act, including those provisions requiring payment within 10 days, or having written express agreements as to payment. The Judicial Officer revoked respondent's license. Respondent's agreements for deferred payment were not written, and many were made after entering into the transactions. Accordingly, the payment terms of the regulations were applicable. Explanation of the reasons for requiring written agreements to be made before a transaction is entered into if payment terms are to be extended (to comply with the statutory amendments relating to the trust provisions, and to ensure that the parties have equal bargaining power). Explanation as to why the Department revokes the license of a respondent who repeatedly and flagrantly fails to pay for produce, irrespective of excuses. Where a seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute full payment, and does not negate a violation of the Act. The mere fact that a respondent denies that its payment violations were flagrant and repeated does not require that a hearing be held if the record, including bankruptcy documents subject to official notice, shows that the respondent has failed to make full payment exceeding a *de minimis* amount. Even where a respondent argues correctly that it would be detrimental to its creditors if it were forced to discontinue business, as a result of a license-revocation order, such arguments (frequently made) are routinely rejected. Ignorance of the law has never been regarded as a mitigating circumstance in any of the Department's disciplinary proceedings. Explanation as to why a license is revoked where there are lengthy delays in making full payment in numerous produce transactions, unless full payment is made by the time of the hearing, and respondent is then in full compliance with the payment requirements, with no agreements for deferred payment beyond 30 days. Lengthy explanation as to the Department's interpretation of "willfulness," as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)). To prove willfulness, the Department is not required to prove that the respondent knew of the provisions of the regulations.

Sharlene Lassiter, for Complainant.
Leroy W. Gudgeon, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),[1] in which Administrative Law Judge Paul Kane (ALJ) filed an initial Decision and Order on October 31, 1988, suspending respondent's license for 30 days for failure to make full payment promptly to 24 sellers for 44 lots of produce from August 1986 through February 1987, totaling $124,197.09. The order does not become effective during those times that the respondent is in full compliance with the Act, including those provisions requiring payment within 10 days, or having written express agreements as to payment.

[1] *See generally* Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 4 (1981 and 1989 Cum. Supp.), and Becker and Whitten, *Perishable Agricultural Commodities Act*, in 10 Harl, Agricultural Law, ch. 72 (1980).

On January 10, 1989, complainant, seeking the revocation of respondent's license, appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[2] On February 9, 1989, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the entire record, respondent's license is revoked, as requested by complainant. The findings of fact are taken verbatim from the ALJ's findings, with changes shown in brackets. The ALJ's Findings 8, and 10 through 12 are omitted. Finding 10 set forth below in brackets is the Judicial Officer's finding.

Findings of Fact

1. The Caito Produce Company, hereinafter referred to as the respondent, is a corporation organized and existing under the laws of the State of Ohio. (Complaint, Answer; CX 1) [Footnote omitted.] Its business mailing address is P.O. Box 6836, 571 Holtzman Ave., Columbus, Ohio 43205. (Complaint; Answer; CX 1)

2. Respondent holds a license, number 701383, issued initially on April 6, 1970, pursuant to Section 4 of the Act (7 U.S.C. § 499d). This license is renewed annually and is next subject to renewal on or before April 6, 1989. (Complaint; Answer; CX 1)

3. Michael Caito and Samuel Caito are co-owners of the respondent corporation. (CX 1; TR 94) The respondent is solely managed, directed and controlled by these owners. (TR 15, 66, 71, 94-95)

4. During August 1986 through February 1987, respondent purchased, received and accepted 44 lots of fruits and vegetables, being perishable agricultural commodities, from 24 sellers, and failed to make full payment promptly of the agreed purchase prices, or outstanding balances due, in the total amount of $124,197.09. (Complaint; Answer; CX 2; TR 2, 10)

5. The record in this matter does not reveal the existence of substantial legitimate disputes concerning these produce transactions because respondent and its suppliers had understandings concerning the quality of produce shipped and received. (TR 68-69, 78, 97-98, 105, 108-109)

6. Respondent, as a matter of course, did not enter into written agreements with the 24 sellers described in finding 4 to extend the payment terms beyond invoice terms. (TR 26, 66, 75, 89, 98, 100, 102, 104)

7. Respondent, as a matter of course, did enter into oral agreements with the 24 sellers described in finding 4 [frequently after the contract was made and the produce was delivered] to extend the payment terms beyond the invoice dates, and made full payment of the transactions described in finding

---

[2]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

4 prior to tbe date of hearing. (RX 1-1 through 44-1; TR 26, 66, 68-69, 75, 77) [Such full payment was made from 4 to 12 months after payment was due under the Act and regulations.]

8. [Omitted.]

9. On April 25 and 26, 1988, [just prior to the hearing held April 28, 1988,] the Department's investigators re-visited respondent's place of business (TR 34) and upon an inspection of respondent's books and records, revealed that the respondent had failed to make full payment promptly for 65 lots of fruits and vegetables received and accepted during the period of March 1987 through March 1988, from 21 sellers in the total amount of $181,668.67. (CX 3, 4) [Many of these accounts were not paid until over 6 months beyond the time payment was due under the Act and regulations. In fact, the delays in making payment extended to just over 1 year.] The record indicates that oral agreements existed for the deferred payment of all tbese purchases (TR 26), and that such agreements with hut two of tbese sellers had not been reduced to written form. (TR 104, 105)

10. [The acts of the respondent set forth in Findings 4 through 7, in failing to make full payment promptly to its suppliers for perishable agricultural commodities it purchased, received, and accepted, constitute willful, flagrant and repeated violations of § 2 of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b).]

Conclusion

Since three of the Department's five ALJs have just recently come to the Department, and the initial decision in this case by one of the new ALJs suggests that he has a deep and basic disagreement witb tbe Department's policy in PACA payment-violation cases, this decision will set forth at length the reasons underlying tbe Department's policy. The conclusions in this decision are largely taken verbatim from prior decisions (including *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984)), issued for many years in similar cases (many affirmed on judicial review), each of whieh merely updates the eitations previously used.

Section I below sets forth the Act and regulations, which require written agreements for deferred payments, that must be made before entering into the transaction. Section II explains why it is important that credit agreements be in writing and made before the transaction is entered into. Since the Department's policy as to "slow pay" cases is inextricably linked with the Department's policy as to "no-pay" cases, the Department's policy as to "no-pay" cases (together witb a diseussion as to when violations are "repeated" and "flagrant") is set forth in § III, followed by the Department's policy as to "slow pay" cases in § IV. Willfulness is discussed in §§ III, IV, and V.

I. The Act and Regulations.

Section 2 of the Perishable Agricultural Commodities Act provides (7 U.S.C. § 499b):

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce--

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction. . . .

Section 8(a) of the Act provides (7 U.S.C. § 499h(a)):

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, . . . the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

The Act provides that the "Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter" (7 U.S.C. § 499*o*).

The regulations provides (7 C.F.R. § 46.2(aa) (1986)):

(aa) "Full payment promptly" is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

(6) Payment to growers, growers' agents, or shippers by terminal market agents or brokers, who are selling for the account of a grower, growers' agent, or shipper and are authorized to collect from the buyer or receiver, within 5 days after the agent or broker receives payment from the buyer or receiver;

. . . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly," *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

II. Sound Reasons Exist for Requiring Written Agreements to Be Made Before a Transaction Is Entered into if Payment Terms Are to Be Extended Beyond the Time Periods Set Forth in the Regulations. Respondent's Agreements Were Not in Writing, and Many Were Made After the Transaction Was Consummated.

In 1984, Congress enacted statutory trust provisions under the Perishable Agricultural Commodities Act[3] similar to those enacted in 1976 and 1987 under the Packers and Stockyards Act, providing (7 U.S.C. § 499e(c)(2)-(3) (Supp. V) (emphasis added)):

(2) Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents. . . .

(3) *The unpaid supplier, seller, or agent shall lose the benefits of such trust unless such person* has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker and *has filed such notice* with the Secretary *within thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction*, or (iii) after the time the supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been dishonored. *When the parties expressly agree to a payment time period different from that established by the Secretary, a copy of any such agreement shall be filed in the records of each party to the transaction and the terms of payment shall be disclosed on invoices, accountings, and other documents relating to the transaction.*

---

[3] *See, e.g., Consolidated Marketing, Inc. v. Marvin Properties, Inc. (In re Marvin Properties, Inc.)*, 76 B.R. 150 (Bankr. 9th Cir. 1987); *In re W.L. Bradley Co.*, 75 B.R. 505 (Bankr. E.D. Pa. 1987); *Houston Avocado Co. v. Monterey House, Inc. (In re Monterey House, Inc.)*, 71 B.R. 244 (Bankr. S.D. Tex. 1986); *St. Joseph Bank & Trust Co. v. DeBruyn Produce Co. (In re Prange Foods Corp.)*, 63 B.R. 211 (Bankr. W.D. Mich. 1986), *aff'd*, No. K85-137 (W.D. Mich. Dec. 15, 5); *In re Fresh Approach, Inc.*, 51 B.R. 412 (Bankr. N.D. Tex. 1985).

As shown in the 1984 statutory amendments, just quoted, Congress expressly required that any agreements for deferred payment be in writing and be made before entering into the transaction. Accordingly, when the Secretary promulgated his regulations implementing the amendatory legislation, he was compelled to require written agreements for deferred payment, and to require that they be made before entering into the transaction.

In connection with the statutory trust provisions, Congress required the Secretary to define a "reasonable" credit period. The congressional report as to the statutory trust legislation states (H.R. Rep. No. 543, 98th Cong., 1st Sess. 6-7 (1983)):

> The Committee finds that it is common practice in the produce business to extend credit for reasonable periods of time beyond the time prescribed for "cash" transactions in regulations issued by the Secretary under the provisions of the Packers and Stockyards Act. Consequently, to be effective, the trust applies to credit transactions as well as to the straight cash transactions. However, the Committee does not intend the trust to apply to any credit transaction that extends beyond a reasonable period. Under the bill, the Secretary is required to establish, through rulemaking, the time by which, the parties to a transaction must agree payment on a transaction must be made, to qualify it for coverage under the trust. An agreement for payment after such time will not be eligible to receive the benefits of the trust.

In accordance with the congressional mandate, the Secretary established 30 days as the "reasonable" time period for credit transactions. Specifically, the Secretary's trust regulations, effective December 20, 1984, provide (7 C.F.R. § 46.46(f)):

> (f) *Prompt payment and eligibility for trust benefits.* (1) The times for prompt accounting and prompt payment are set out in 46.2(z) and (aa). Parties who elect to use different times for payment must reduce their agreement to writing before entering into the transaction and maintain a copy of their agreement in their records, and the times of payment must be disclosed on invoices, accountings, and other documents relating to the transaction.
>
> (2) The maximum time for payment for a shipment to which a seller, supplier, or agent can agree and still qualify for coverage under the trust is 30 days after receipt and acceptance of the commodities as defined in § 46.2(dd) and paragraph (b)(1) of this section.

The Secretary's regulations relevant to this case are authorized by the Act, were promulgated in accordance with the notice and comment provisions of the Administrative Procedure Act (5 U.S.C. § 553; 49 Fed. Reg. 34,024 (1984); 49 Fed. Reg. 45,735 (1984), and have the force and effect of law. The notice of proposed rulemaking explained the 1984 regulations as follows (49 Fed. Reg. 34,024, 34,024, 34,026-34,027 (1984)):

> The purpose of the amendments is to implement the amendments contained in Pub. L. 98-273, approved May 7, 1984, by which Congress impressed a statutory trust on perishable agricultural commodities received by commission merchants, dealers, and brokers for the benefit of suppliers, sellers, or agents who have not been paid. . . .

. . . .

. . . In the past few years, three problem areas have become apparent. They reflect changes in the industry's financial picture, and have added an abnormal marketing risk burden against which sellers are unable to protect themselves. Climbing overhead costs, including the cost of debt servicing, are reflected by a marked increase in delayed payments for produce: Also, an increase in hidden security agreements which encumber buyers' assets results in the diversion of money owed for produce away from suppliers. Finally, business failures and bankruptcy losses with no possibility of meaningful recovery have shown a steady increase. These factors combine to prejudice sellers' ability to obtain prompt payment for produce. It is these problem areas that the provisions of Pub. L. 98-273 are intended to overcome.

These amendments to the Perishable Agricultural Commodities Act provide suppliers and sellers of fruits and vegetables, or their agents, a self-help tool that will enable them to protect themselves against the abnormal risk of losses resulting from slow-pay and no-pay practices of buyers or receivers of fruits and vegetables. . . . The proposed regulations clarify and add to present rules in order to establish, where needed, times for prompt payment so as to qualify the transactions for trust benefits. The proposed regulations also set forth the maximum time within which suppliers, sellers, and agents may agree payment is due, and still be covered by the trust provision. . . .

. . . .

. . . If the parties agree to a payment period different from those established in § 46.2(aa), the agreement must be in writing and entered into prior to the time of the transaction. A copy must be maintained in each party's records, and the times for payment must be disclosed on invoices, accountings and other documents relating to the transaction.

Congress directed the Secretary to establish the maximum time by which the parties to a transaction can agree payment on a transaction must be made and still qualify for coverage under the trust. An agreement for payment after such time will not qualify for trust coverage.

Current payment practices, as reflected by administrative experience and industry sources, indicate that contracts calling for payment within 30 days from receipt and acceptance of the goods should qualify for trust coverage, and that contracts that call for later payment should not qualify for trust coverage. Therefore, as set forth in § 46.46(f)(2), if an agreement calls for payment 31 days or more after receipt and acceptance of the goods, the trust provisions will not apply to that transaction. . . .

. . . .

Section 46.2(aa)(9) also provides that parties to a contract may enter an express agreement at the time a contract is made to provide a different time for payment than that prescribed in the regulations for the type of contract involved. This provision would be removed from § 46.2(aa)(9) and renumbered § 46.2(aa)(11), and include the requirement that the

terms of any agreement to vary the times for payment prescribed in paragraphs (a)(1) through (10) be reduced to writing so as to assure conformity with the provisions of the trust.

Accordingly, the requirement that written agreements for credit be made before entering into a produce transaction is of vital importance to suppliers, sellers, and agents who want the benefits of the statutory trust provisions of the Act. Any written agreement for credit terms beyond 30 days nullifies the statutory trust provisions. Suppliers, sellers, and agents are, therefore, reluctant to enter into contracts which nullify their trust protection.

Another reason for requiring that agreements for deferred payment be consummated before entering into the transaction is because of the unequal bargaining power of the parties, once the buyer has the produce. As stated in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118, 122-23 (1984):

> However, the agreement [to provide for payment terms different from the time limits set forth in the regulations] must be reached at the time the contract is made, or it is meaningless for regulatory purposes. For example, an agreement to extend the time for payment made after the payment time has expired does not negate the violation.[5]

---

[5]*In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. [1505, 1513 (1983)]; *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1137-38 (1981); *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1382 (1979), *aff'd per curiam*, 630 F.2d 370, 373 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 733-40 (1975), [*aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished)], *cert. denied*, 434 U.S. 920 (1977).

> There is a sound basis for the regulatory requirement that agreements to extend the time for payment must be made at the time the purchase contract is made. After the buyer has the produce, the parties are no longer dealing on equal terms. The seller can no longer refuse to sell; the buyer is the only one with options, *i.e.*, he can pay or not pay, as agreed. Thus the buyer would have an unfair advantage in any negotiations on payment terms after delivery. In order to ensure that the parties deal on equal terms, the regulations do not recognize (for disciplinary purposes) changes made in the time for payment after the contract is made.

The regulations as to prompt payment for produce were significantly amended in 1972, and again in 1984. The regulations published in 1963 provided (28 Fed. Reg. 7067, 7068-69 (1963)) (codified at 7 C.F.R. § 46.2(aa)(5)):

> (aa) "Full payment promptly" is the term used in the act in specifying the period of time for making payment without committing a violation of the act. The contracting parties have the right to agree as to when payment is due in connection with any transaction. In the absence of such agreement, "full payment promptly," for the purpose of determining violations of the act, means:
>
> . . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted after arrival at the contract destination without complaint by the buyer. . . .

Following the decision in *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1557-61 (1971), holding that an implied agreement was sufficient under the then existing regulations, the regulations were amended to require an express agreement for delayed payment at the time the contract is made. The 1972 amendment provided (37 Fed. Reg. 14,561 (1972)) (codified at 7 C.F.R. § 46.2(aa)(9)):

(aa) "Full payment promptly" is the term used in the act in specifying the period of time for making payment without committing a violation of the act. "Full payment promptly," for the purpose of determining violations of the act, means:

. . . .

(9) . . . *Provided, however*, That as an exception to subparagraphs (1) through (9) of this paragraph, the parties may, by express agreement at the time the contract is made, provide a different time for payment, and if they have so agreed, then payment within the time provided shall constitute "full payment promptly": *Provided, further*, That the party claiming the existence of such express agreement as to time of payment shall have the burden of proving it.

Subsequently, effective December 20, 1984, the prompt payment regulations were amended as a result of the statutory trust legislation to require not only an express agreement at the time the contract is made, but, also, to require that the agreement be in writing (49 Fed. Reg. 45,735, 45,740 (1984)) (codified at 7 C.F.R. § 46.2(aa)(11)), quoted in § I, *supra*.

In the present case, respondent's agreements for deferred payment were not in writing, and were frequently made after the contract was made and the produce was delivered. That is, in many instances, after respondent was heavily indebted to the produce sellers, the sellers agreed to a schedule of delayed payments to be made by respondent. Respondent's violations were not negated by agreements not in writing[4] or made after the transactions were consummated.[5]

---

[4] *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486, 503-04 (1987), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988) (unpublished; text in WESTLAW).

[5] *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 121-22 (1984); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1137-38 (1981); *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1382 (1979), *aff'd per curiam*, 630 F.2d 370, 373 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 743 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

III. Respondent's Violations Were Repeated and Flagrant. Such Violations in "No-Pay" Cases Result in Automatic License Revocation or an Equivalent Order

The ALJ correctly held that respondent's 44 violations of the Act referred to in Findings 4 through 7 were "repeated."[6] Although the ALJ did not conclude that respondent's violations of the Act were "flagrant," they were "flagrant" under well-established precedents, in view of the large amount of money involved in the violations ($124,197.09), and the large number of transactions (44).[7] The violations were also flagrant since they continued over such a long period of time (6 months) when respondent knew of its difficult financial condition, which precluded timely payment.[8]

---

[6]*Reese Sales Co v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 610 n. 6 (3d Cir. 1960); *In re John A. Pirrello Co.*, 48 Agric. Dec. ____ (Jan. 27, 1989); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. ____ (Jan. 27, 1989); *In re Roman Crest Fruit, Inc.*, 46 Agric. Dec. 612, 620-21 (1987); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2027 (1985); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 125 (1984); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 403 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1640 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *accord In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1169 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1127 (1982), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 743 (1982); *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1156-57 (1981), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1135 (1981); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1640 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 748 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

[7]*See, e.g., Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972); *In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. ____ (Apr. 21, 1989); *In re John A. Pirrello Co.*, 48 Agric. Dec. ____ (Jan. 27, 1989); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. ____ (Jan. 27, 1989); *In re Roman Crest Fruit, Inc.*, 46 Agric. Dec. 612, 620-21 (1987); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2027 (1985); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 125 (1984); *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. 1930, 1933 (1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2427 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1169-70 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 743 (1982); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1127-28 (1982), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1156-57 (1981), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1135 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 403 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112-13 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 747 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

[8]See *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir. 1973), *cert. denied*, 419 U.S. 830 (1974); *Zwick* (continued...)

Failure to pay for produce is a very serious violation of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), which results in an order revoking the license of the offender,[9] since it is the "goal [of the Perishable Agricultural Commodities Act] that only financially responsible persons should be engaged in the perishable agricultural commodities industry,"[10] and it is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents,

---

[8](...continued)
v. Freeman, 373 F.2d 110, 115-17 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 126-27 (1984); *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. 1930, 1933 (1983), *aff'd per curiam*, 747 F.2d 1463 (5th Cir. 1984) (unpublished); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2427-28 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1170, 1179 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 743-44 (1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1135 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 403 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 713 (1978); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1640-41 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *In re Catanzoro*, 35 Agric. Dec. 26, 31 (1976), *aff'd sub nom. Catanzoro v. United States and Butz*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 747 (1975), *aff'd*, 548 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

[9]*E.g.*, *In re John A. Pirrello Co.*, 48 Agric. Dec. ____ (Jan. 27, 1989); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. ____ (Jan. 27, 1989); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173 (1987); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2025 (1985); *In re Cuttone*, 44 Agric. Dec. 1573 (1985), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Farm Market Service, Inc.*, 44 Agric. Dec. 316 (1985); *In re Clarence Miller Co.*, 43 Agric. Dec. 529 (1984); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118 (1984); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. 1505 (1983); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 410 (1983); *In re Old Virginia, Inc.*, 42 Agric. Dec. 270, 272 (1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1126 (1982), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1156-59 (1981), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 401-02 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 414-16 (1980); *In re Hol Merdler Produce, Inc.*, 37 Agric. Dec. 809, 811-12 (1978); *In re Solt*, 35 Agric. Dec. 721, 723, 726 (1976); *In re Catanzoro*, 35 Agric. Dec. 26, 30-36 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467; *accord In re Kafesok*, 39 Agric. Dec. 683, 686-87 (1980), *aff'd* 673 F.2d 1329 (6th Cir. 1981) (unpublished), *reprinted in* 41 Agric. Dec. 88 (1982).

[10]*Marvin Trogash Co. v. USDA*, 524 F.2d 1255, 1257 (5th Cir. 1975); *accord Childsey v. Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971); *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1168 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133 (1981); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982).

but also to other potential violators. The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 424-32, 435-62 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988) (Appendix A at 198-209, 213-51).[11]

It should be noted that significant changes were made in the Department's sanction policy following (and as a result of) the holding in *Farrow v. USDA*, 760 F.2d 211 (8th Cir. 1985). The legislative history of the Act and the material relevant to the *Farrow* decision are set forth in *Spencer*, 46 Agric. Dec. at 424-31, 455-62; Appendix A at 198-208, 242-51. Since an appeal in this case lies to the 6th Circuit, which has recently criticized the tone of the language of the *Spencer* sanction policy (*Parchman v. USDA*, 852 F.2d 858, 861, 863 n. 6, 866 (6th Cir. 1988); and see *Garver v. United States*, 846 F.2d 1029, 1030-31 (6th Cir.), *cert. denied*, 109 S. Ct. 63 (1988)), my response, set forth in *In re Rodman*, 47 Agric. Dec. ____, slip op. at 4-20 (Sept. 22, 1988) (order denying reconsideration), is attached as Appendix B.[12] Moreover, as shown below, the revocation order imposed in this case is completely for remedial, rather than punitive, reasons.

"Failure to pay violations not only adversely affect the party who is not paid for produce, but such violations have a tendency to snowball. 'On occasions, one licensee fails to pay another licensee who is then unable to pay a third

---

[11]Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Cotonzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Morvin Tragosh Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

[12]To update the information in the *Rodman* appendix, slip op. at 11 n. 2, the Judicial Officer awarded attorney fees to the respondent in *In re Prentice*, 47 Agric. Dec. ____ (Oct. 27, 1988) (order awarding attorney fees and other expenses). The case of *Apex Meat Co. v. Crawford*, No. 88-5646 (9th Cir.), challenging the validity of the Secretary's removal of the Judicial Officer after he had issued certain orders against the Department, referred to in the *Rodman* appendix, slip op. at 16 (text accompanying note 3), became moot when the violator sold his business.

licensee.' This could have serious repercussions to producers, licensees and consumers."[13]

If the violator who fails to pay for produce does not have a license in effect, an order is issued finding that the person has engaged in repeated or flagrant violations of the Act,[14] which is the equivalent of a license-revocation order since it has the same effect on the violator and on persons responsibly connected with the violator as a license revocation.[15]

Even though a respondent has good excuses for payment violations, perhaps beyond its control, such excuses are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful. As stated by the Judicial Officer in *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983):

> Even if respondent had been completely unaware that its transactions from February to July 1979 were risky, and even if it were determined that respondent had a good excuse for the failures to pay involved here, it has repeatedly been held under the Act that all excuses are routinely rejected

---

[13]*In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2426 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1169 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982); *accord In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1134 (1981). Although the Act is primarily to protect producers, it "is also 'for the protection of consumers' (H.R. Rep. No. 1196, 84th Cong., 1st Sess., p. 2), inasmuch as increased industry costs resulting from failures to pay or other unfair practices are ultimately borne by consumers." *In re Catonzoro*, 35 Agric. Dec. 26, 33 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977).

[14]*E.g.*, *In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. ____ (Apr. 21, 1989); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. ____ (Sept. 8, 1988), *appeal docketed*, No. 88-3214 (7th Cir. Nov. 15, 1988); *In re Reeves Produce, Inc.*, 44 Agric. Dec. 1607 (1985), *aff'd per curiam*, 790 F.2d 163 (D.C. Cir. 1986) (unpublished); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583 (1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987); *In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602 (1985), *appeal dismissed*, No. 85-1590 (D.C. Cir. Sept. 29, 1986); *In re Food Marketers, Inc.*, 44 Agric. Dec. 1578 (1985); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151 (1983); *In re Bananas, Inc.*, 42 Agric. Dec. 588 (1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2426 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1168-92 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 748 (1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133-34, 1151 (1981); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961, 968-71 (1981), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re Kafesak*, 39 Agric. Dec. 683, 686-87 (1980), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (unpublished), *reprinted in* 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 714-21 (1978); *In re Pappos Produce, Inc.*, 36 Agric. Dec. 684, 694-96 (1977); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633, 1643-45 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1885-89 (1975); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 748-52 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1896-1914 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 253, 266-70 (1973), *aff'd* 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

[15]*In re V.P.C., Inc.*, 41 Agric. Dec. 734, 748-49 (1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1151-52 (1981); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 714-15 (1978); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750-51 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

in determining whether payment violations occurred or whether violations were wilful since "the Act calls for payment -- not excuses."[16]

A possible exception to the *Finer Foods* doctrine just quoted is stated in *In re Produce Brokers, Inc.*, 41 Agric. Dec. 2247, 2250-51 (ruling on certified questions), *final decision*, 42 Agric. Dec. 124 (1982), as follows:

Although mitigating circumstances are generally considered in determining sanctions in the Department's disciplinary cases, all excuses

---

[16]*Accord In re John A. Pirrello Co.*, 48 Agric. Dec. ____ (Jan. 27, 1989) (nonpayment because respondent's customers ceased doing business with respondent when the city announced it was taking respondent's property by eminent domain); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 177 (1987) (nonpayment because of bankruptcy resulting after respondent suddenly lost its largest customer); *In re B.G. Soles Co.*, 44 Agric. Dec. 2021, 2028 (1985) (nonpayment because bank suddenly refused to extend credit as it agreed, and the bank took $50,000 of respondent's funds in the bank's possession); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1246 n. 3 (1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986) (nonpayment because respondent suffered about $200,000 in losses in 2-year period from theft of produce from his warehouse); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. 1505 (1983) (nonpayment because of bankruptcy caused by failure of large purchaser from respondent to comply with its contractual agreement); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151 (1983) (nonpayment because another firm failed to pay respondent $248,805.66); *In re Bananas, Inc.*, 42 Agric. Dec. 588 (1983) (nonpayment because of a major customer's insolvency, the failure of other debtors to pay respondent, and increased operating costs); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2428, 2442-44 (1982) (nonpayment because of bankruptcy), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171 (1982) (nonpayment because of bankruptcy), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982) (nonpayment because of bankruptcy of another firm owing respondent $776,459.23), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (nonpayment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1138-40 (1981) (nonpayment because respondent suddenly and unexpectedly lost a major sales account); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981) (nonpayment because of financial difficulties), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 113 (1981) (nonpayment because respondent lost a major sales account and a large supplier changed its course of dealing with respondent, demanding cash on delivery), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Kafesak*, 39 Agric. Dec. 683, 685-86 (1980) (nonpayment because of strike and failure of others to pay respondent), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (unpublished), *reprinted in* 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978) (nonpayment because of failure of others to pay respondent); *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976) (nonpayment because of railroad strike), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 266-68 (1973) (nonpayment because of financial difficulties), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *accord In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (nonpayment because of financial difficulties, including difficulty in collecting from others), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981) (nonpayment because respondent lost a major sales account and three large suppliers would no longer extend credit), *aff'd mem.*, 681 F.2d 804 (3d Cir. 1982), *cert. denied*, 459 U.S. 831 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, 1641-42 (1976) (nonpayment because of financial difficulties), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *In re Soit*, 35 Agric. Dec. 721, 723-24 (1976) (nonpayment because of bankruptcy of another firm owing respondent over $130,000.00); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (nonpayment because of financial difficulties); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (nonpayment because of financial difficulties); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (nonpayment because of financial difficulties).

as to why payment was not made have been disregarded in determining the sanction in cases involving failure to pay under the Perishable Agricultural Commodities Act in view of the statutory provisions and the nature and history of the program. *In re Esposito*, 38 Agric. Dec. 613, 632-40 (1979). . . .

Judge Weber's final question -- "What might constitute mitigation to reduce the sanction?" -- involves a hypothetical question that need not be determined here. It is sufficient for present purposes to rely on settled precedent holding that the customary excuses for payment violations are ignored in determining sanctions under the Perishable Agricultural Commodities Act. Such excuses include violations caused by financial difficulties resulting from a variety of reasons, such as the failure of a large creditor to pay respondent, business recessions, strikes, adverse weather conditions, sudden loss of a major account, ill health of a key person, etc.

It will be time enough to determine what extraordinary circumstance, such as war, 1932 type depression, collapse of the national banking system, etc., might constitute mitigation to reduce or eliminate a sanction under the Perishable Agricultural Commodities Act if such a circumstance is presented on the record of a case.

In affirming the Judicial Officer's decision involving conclusions essentially the same as those set forth above, the court held in *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983), that the Judicial Officer properly interpreted the Act in refusing to consider excuses for failure to pay in determining whether payment violations occurred or whether they were willful, stating:

The petitioner argues that the Judicial Officer improperly refused to consider various "mitigating factors" that, according to it, should have been viewed as excusing its failure to pay its debts. These include the allegedly relatively small amount the petitioner owed, the absence of previous violations by the petitioner, and the lack of "devious or dishonest practices by the petitioner." In refusing to consider these factors, the Judicial Officer pointed out that "it has repeatedly been held under the Act that all excuses are routinely rejected in determining whether payment violations occurred or whether violations were wilful since 'the Act calls for payment--not excuses'" *Quoting In re Kafesak*, 39 Agric. Dec. 683, 686 (1980) [, *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (unpublished), *reprinted in* 41 Agric. Dec. 88 (1982)]. *See also In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982) [, *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982)].

The Judicial Officer properly interpreted the Act. Section 2(4), 7 U.S.C. § 499b(4) (1976), is unequivocal. It makes it unlawful for a licensee to "fail or to refuse . . . to . . . make full payment promptly." As Congress noted in amending the Act in 1956, "The Perishable Agricultural Commodities Act is admittedly and intentionally a 'tough' law." S.Rep. No. 2507, 84th Cong., 2d Sess. (*citing* H.Rep. No. 1196, 84th Cong., 1st Sess.), *reprinted in* 1956 U.S. Code Cong. & Ad.News 3699, 3701. The Secretary explained the reason for this strict requirement in *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.*, [673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982)]:

> Failure to pay violations not only adversely affect the party who is not paid for produce, but such violations have a tendency to snowball. "On occasions, one licensee fails to pay another licensee who is then unable to pay a third licensee." This could have serious repercussions to producers, licensees and consumers.

Quoting In re John H. Norman & Sons Distrib. Co., 37 Agric. Dec. 705, 720 (1978).

In sum, the "goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835, 88 S. Ct. 43, 19 L.Ed.2d 96 (1967) *quoted in Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975).

The strict policy of the Secretary that all excuses for nonpayment are disregarded furthers this goal. Under the Act a licensee is required to conduct his business in a manner that insures that he pays his bills fully and promptly. If he fails to do so, he violates the Act. For this reason, alleged mitigating circumstances are irrelevant.

The court, in *Harry Klein Produce Co. v. USDA*, 831 F.2d 403, 405 (2d Cir. 1987), similarly recognized that the "intentionally rigorous" Perishable Agricultural Commodities Act is to insure "financial responsibility" in the produce industry, stating:

> The PACA is a remedial statute designed to ensure that commerce in agricultural commodities is conducted in an atmosphere of financial responsibility. *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 782 (D.C. Cir. 1983) (citing cases); *see Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835, 88 S. Ct. 43, 19 L.Ed.2d 96 (1967). It is an intentionally rigorous law whose primary purpose is to exercise control over an industry "which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous." S. Rep. No. 2507, 84th Cong., 2d Sess. 3 (1956), *reprinting* H. Rep. No. 1196, 84th Cong., 1st Sess. (1955), *reprinted in* 1956 U.S. Code Cong. & Admin. News 3699, 3701, *quoted with approval in Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1028 n. 2 (5th Cir. 1982).

The reasons why all excuses are rejected in payment violation cases under the Perishable Agricultural Commodities Act, and why they are not regarded as mitigating circumstances, are set forth in *In re Esposito*, 38 Agric. Dec. 613, 632-40 (1979). In that case it is stated, *inter alia* (38 Agric. Dec. at 635-40):

> Most of the cases cited by Judge Weber in support of his view that mitigating circumstances are improperly disregarded are cases involving failure to pay for produce under the Perishable Agricultural Commodities Act. It is true that under that regulatory program, excuses as to why payment was not made (usually because someone else failed to pay the violator) are disregarded in determining the sanction. But that is because of the statutory provisions and the nature and history of that particular regulatory program.

The Perishable Agricultural Commodities Act makes it unlawful to "fail or refuse truly and correctly to account and make full payment promptly" (7 U.S.C. § 499b(4)). It provides for the automatic suspension of a license if a firm fails to pay a reparation award or is discharged as a bankrupt (7 U.S.C. §§ 499g(d), 499d(a)).[7] [Footnote 7 states: "The Act was amended effective October 1, 1979, to authorize the Secretary to continue a license in effect after a discharge in bankruptcy (92 Stat. 2549, 2673)."]

The Perishable Agricultural Commodities Act was enacted at the request of the regulated iodustry. It is the only regulatory program administered by the Department paid for by the regulated industry through license fees. Payment violations are the very heart of the regulatory program. The industry desires and supports a toughminded administration of the Act which requires full payment irrespective of the reasons for non-payment.

The reason for the Department's position as to this Act was stated as follows in *In re J. H. Norman & Sons Distributing Co.*, 37 Agric. Dec. 705, 715-716, 719-720 (1978):

> Unfortunately for Mr. Norman, he chose to engage in business in the regulated agricultural marketing system, which is probably the only field in which inability to pay one's bills is unlawful (or even dishonorable). Debtor's prisons are archaic; bankruptcy has lost its stigma; but the failure to pay for fruits and vegetables in commerce is unlawful (7 U.S.C. § 499b(4)).
>
> Special laws have been enacted relating to the agricultural marketing system because "a sound, efficient and privately operated system for distributing and marketing agricultural products is essential to a prosperous agriculture and is indispensable to the maintenance of full employment and to the welfare, prosperity, and health of the Nation" (7 U.S.C. § 1621).
>
> The failure by produce marketing firms to pay for produce would have a tendency to increase overall marketing costs which, ultimately, would be reflected in lower farm prices, higher consumer prices, or both. This would be contrary to the expressed purpose of Congress to provide for "an integrated administration of all laws enacted by Congress to aid the distributioo of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and the price spread between the producer and coosumer may be narrowed" (7 U.S.C. § 1621).
>
> The need for a severe sanction io cases of this nature was explained io *In re Sam Leo Catanzaro, supra*, 35 Agric. Dec 26, 32-36 (1976), affirmed *sub nom. Catanzaro v. United States and Butz*, [556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec 467], as follows (see, also, Tr. 19-70):
>
> The severe sanctioo imposed in this case for the respondent's serious, repeated and flagrant violations of the Act is consistent with the Congressional purpose in enacting the statute. "The Perishable Agricultural Commodities Act is admittedly and intentionally a 'tough'

law" (H.R. Rep. No. 1196, 84th Cong., 1st Sess., p. 2). "The law has fostered an admirable degree of dependability and fairness in this industry * * *. * * * In spite of the strictness of some of the provisions of the law, the act and its administration by the Department of Agriculture have won the almost unanimous approval of this important food distributing industry and now have its virtually undivided support" (*ibid.*).[17]

In *Birkenfield v. United States*, 369 F.2d 491, 494 (C.A. 3), the Court stated:

> The object of the Act is to suppress unfair and fraudulent practices in the industry. Enacted in 1930, the Act is regarded today as one of the government's most successful regulatory programs, and the Act has received enthusiastic support from members of the regulated industry.[18]

The "goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Marvin Tragash Co. v. United States Dept. of Agr.* [524] F.2d [1255] (C.A. 5), No. 75-1481, decided December 24, 1975. The purpose of the Act was stated in *Zwick v. Freeman*, 373 F.2d 110, 116 (C.A. 2), certiorari denied, 389 U.S. 835, as follows:

> The Perishable Agricultural Commodities Act is designed to protect the producers of perishable agricultural products who in many instances must send their products to a buyer or commission merchant who is thousands of miles away. It was enacted to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct. H. Rept. No. 1196, 84th Cong. 1st Sess. 2 (1955).

* * *

Revocation of respondent's license, in view of his repeated and flagrant violations of the Act, is not only authorized by the Act (7

---

[17] *Accord*, S. Rep. No. 2507, 84th Cong., 2d Sess. 3-4 (1956); *United States v. William E Mandell Co.*, 242 F. Supp. 873, 875 (E.D. Pa. 1965); *In re Columbus Fruit Co.*, 40 Agric. Dec 109, 113-14 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 8 (1982).

[18] In a Congressional report as to a 1962 amendment to the Act, it is stated (H.R. Rep. No. 154 87th Cong., 2d Sess. 3 (1962)): "Testimony of the shippers, brokers, wholesalers, and oth elements of the trade in fresh and frozen fruits and vegetables who have been operating under th act is enthusiastically and almost unanimously in its support. It has brought a high degree stability and responsibility to an industry which had frequently been beset by instability a irresponsibility. It is regarded as one of our most successful regulatory programs." *Acco Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966); *In re Columbus Fruit Co.*, 40 Agr Dec. 109, 114 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. (1982).

U.S.C. § 499h(a)) [footnote omitted], but is also consistent with other provisions of the Act, which are not applicable here. . . . Similarly, if a licensee fails to pay a reparation order under the Act, his license is automatically suspended until the reparation order is paid, irrespective of whether he is unable to pay because of circumstances beyond his control (7 U.S.C. § 499g(d)).

* * *

If a licensee is going to extend credit to its purchasers in this regulated industry, it must be adequately capitalized to be able to sustain any losses that result. If losses occur which jeopardize a licensee's ability to meet its obligations, it must immediately obtain more capital, or suffer the consequences if violations occur. In this regulated industry, the risk of loss should be taken by the banking community, whose business it is to supply risk capital, or by stockholders or other risk takers. Other licensees engaged in business in this vital agricultural marketing system should not be subjected to the risk resulting from respondent's undercapitalization or bad debt experience.

The peculiar vulnerability of producers of perishable agricultural commodities and livestock, and the importance of the Department's regulatory programs to assure payment for these commodities, were again recognized by Congress in the recent Bankruptcy Act Amendments, in which it is provided (92 Stat. 2549, 2593):

§ 525. Protection against discriminatory treatment

Except as provided in Perishable Agricultural Commodities Act, 1930 (7 U.S.C. §§ 499a-499s), the Packers and Stockyards Act, 1921 (7 U.S.C. §§ 181-229), and Section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943 (57 Stat. 422; 7 U.S.C. § 204),[8] a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other

[8]This is an Act supplementing the Packers and Stockyards Act.

similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to replacement against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

Congressman Foley, Chairman of the House Agriculture Committee, explained the need for the foregoing special provisions applicable to the Perishable Agricultural Commodities Act and the Packers and Stockyards Act as follows (Proceedings and Debates of the 95th Cong., 1st Sess., Vol. 19, pp. H 11761-H 11762 (October 28, 1977) [, now 123 Cong. Rec. 35,671-72 (1977)]):

Under the Packers and Stockyards Act and the act of July 12, 1943, persons purchasing livestock in commerce are required to conduct their businesses in a financially responsible manner, and market agencies and dealers * * * are required to have a bond and to pay for all livestock purchased. The licenses of market agencies and dealers may be suspended if they become insolvent. Packers may be ordered to cease and desist from failing to pay for livestock and packers who become insolvent may be ordered to cease and desist from operating except under such conditions as the Secretary may impose.

Under the Perishable Agricultural Commodities Act, commission merchants, dealers, and brokers are required to be licensed and to account and pay promptly for all commodities purchased. Failure to pay can result in suspension of a license, and flagrant and repeated failure may result in revocation of a license. Licensees may in certain circumstances be required by the Secretary to post a bond as evidence of financial responsibility. And the Secretary may refuse to issue licenses to persons who have violated the act or have been convicted of a felony.

The Committee on Agriculture has no quarrel with the "fresh-start" philosophy underlying this bill. However, that philosophy is not new and has heretofore been one of the principal purposes of the bankruptcy laws. Because of the peculiar vulnerability of producers of perishable agricultural commodities and livestock, Congress has seen fit, notwithstanding this philosophy, to enact and from time to time amend the Perishable Agricultural Commodities Act, the Packers and Stockyards Act, and the Act of July 12, 1943.

The Committee on Agriculture conducted oversight hearings on the PACA program twice in the 94th Congress and found that the program is generally operating well and serving its purpose in protecting the producers of perishable agricultural commodities and the public. Last year, after extensive hearings, Congress enacted Public Law 94-410 which made extensive amendments to the Packers and Stockyards Act and the act of July 12, 1943, to assist the Secretary to prevent recurrence of the catastrophic losses to livestock producers which attended the bankruptcies of several large packers in the past few years. Both of these programs must be continued if this Nation is to continue to have a ready source of nutritious food at prices which are reasonable to both the producer and the consumer.

Considering all of the circumstances, there is a sound basis for the Department's position that excuses as to why payment was not made should not be regarded as a mitigating circumstance where there are serious payment violations. Although the Department's approach to enforcing the Perishable Agricultural Commodities Act appears harsh, in

many cases it is not as harsh as it would seem. For example, many persons who suffer a financial loss or otherwise become in a precarious financial position continue to operate for many months and even increase their business substantially, without obtaining new capital, thereby subjecting many persons who sell produce to them to the risk of financial loss. Such conduct has repeatedly been characterized as "flagrant." See *In re John H. Norman & Sons Distributing Co.*, 37 Agr Dec 705, 713 (1978); *In re Atlantic Produce Co.*, 35 Agr Dec 1631, 1640-1641 (1976), [*aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978)]; *In re Sam Leo Catanzaro*, 35 Agr Dec 26, 31 (1976), affirmed *sub nom. Catanzaro v. United States and Butz*, [556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agr Dec 467 (1977)]; *In re M. & H. Produce Co.*, 34 Agr Dec 700, 747 (1975), [*aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977)]; *In re George Steinberg & Son*, 32 Agr Dec 236, 243-244 (1973), affirmed *sub nom. George Steinberg & Son, Inc v. Butz*, 491 F.2d 988 (C.A. 2), certiorari denied, 419 U.S. 830.

As stated in *Zwick v. Freeman*, 373 F.2d 110, 115 (C.A. 2), certiorari denied, 389 U.S. 835 --

> it is inconceivable that petitioners were unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of the Commodities Act. It would be hard to imagine clearer examples of "flagrant" violations of the statute than were exemplified by petitioners' conduct.

In addition, many firms which experience losses that result in their ultimate failure to pay experience such losses because they were not sufficiently cautious in extending credit. See, *e.g., In re J. H. Norman & Sons Distributing Co.*, 37 Agr Dec 705, 708-709 (1978).

But even where the failure to receive payment could not have been reasonably foreseen, and the firm immediately discontinues business (being unable to pay all of its creditors), if "a licensee is going to extend credit to its purchasers in this regulated industry, it must be adequately capitalized to be able to sustain any losses that result." *In re J. H. Norman & Sons Distributing Co.*, 37 Agr Dec 705, 719 (1978).

Undoubtedly there have been some cases where the policy under the Perishable Agricultural Commodities Act has been "harsh," but "occasional hardship to the individual is a consideration outweighed by the declared policy of Congress. *Zwick v. Freeman, supra*, 373 F.2d at 118. See, also, *United States v. Dotterweich*, 320 U.S. 277, 284-285; *Callaghan v. Reconstruction Finance Corp.*, 297 U.S. 464, 468; *Dairymen's League Cooperative Ass'n. v. Brannan*, 173 F.2d 57, 66 (C.A. 2), certiorari denied, 338 U.S. 825; *General Ice Cream Corp. v. Benson*, 113 F. Supp. 107, 108 (N.D. N.Y.), affirmed, *per curiam*, 217 F.2d 646 (C.A. 2)." *In re George Steinberg & Son*, 32 Agr Dec 236, 248 (1973), affirmed *sub nom. George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (C.A. 2), certiorari denied, 419 U.S. 830.

As shown above in the lengthy quotation from the *Esposito* case, in the 1978 Bankruptcy law, Congress specifically exempted two regulatory programs--the

Perishable Agricultural Commodities Act and the Packers and Stockyards Act--from the provisions of § 525 of the Bankruptcy law (11 U.S.C. § 525) that otherwise would have prevented the revocation of a license because of bankruptcy or the failure to pay a debt dischargeable under the Bankruptcy law.

Section 525 of the 1978 Bankruptcy law was enacted to codify *Perez v. Campbell*, 402 U.S. 637 (1971), which held that a State would frustrate the Congressional policy of a fresh start for a debtor if it were permitted to refuse to renew a drivers license because a tort judgment resulting from an automobile accident had been unpaid as a result of a discharge in bankruptcy. Section 525 of the 1978 Bankruptcy law extends the *Perez* holding to both state and federal governmental agencies. The legislative history of the 1978 Bankruptcy law states that § 525 codifies the result of *Perez* (S. Rep. No. 989, 95th Cong., 2d Sess. 81 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess. 366-67 (1977)). But as shown above, the Perishable Agricultural Commodities Act regulatory program was expressly excepted from § 525.

Prior to the 1978 Bankruptcy law, it was held that where a respondent's failure to pay under the Perishable Agricultural Commodities Act results from bankruptcy, there is no unconscionable or excessive conflict between the Department's disciplinary action revoking the respondent's license under the Perishable Agricultural Commodities Act and the bankruptcy law.[19] As shown above, § 525 of the 1978 Bankruptcy law expressly preserves the right of the Secretary to revoke a bankrupt's license under the Perishable Agricultural Commodities Act because of debts dischargeable in bankruptcy.

The Chairman of the House Committee on Agriculture, who proposed the amendment exempting the Perishable Agricultural Commodities Act and the Packers and Stockyards Act from the provisions of § 525 of the 1978 Bankruptcy law, stated (123 Cong. Rec. 35,671 (1977)):

> The Agriculture Committee has no quarrel with the basic philosophy underlying this provision which is to prevent discrimination against a person solely--and I emphasize the word "solely"--because that person has undergone bankruptcy. However, I am concerned that, without clarification, the section might be interpreted in such a way as to prevent the Secretary of Agriculture from carrying out his statutory responsibilities under the Perishable Agricultural Commodities Act, the Packers and Stockyards Act, and the supplementary packers and stockyards legislation contained in the Act of July 12, 1943, 7 U.S.C. 204. This amendment is simply designed to clarify the fact that Section 525 does not in any way interfere with administration by the Secretary of Agriculture of these statutes.

---

[19] *Zwick v. Freeman*, 373 F.2d 110, 115-17 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883-87, 1890-92, 1897-98 (1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1908-13 (1974), *aff'd*, 524 F.2d 1255, 1256-58 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 255-59 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); and *see In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2433-40 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1176-82 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1144-50 (1981); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961, 969 (1981), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 115 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982).

Other statements made at the same time by the Chairman of the House Committee on Agriculture are set forth above in the lengthy quotation from the *Esposito* case, including the Chairman's statement that, under the Perishable Agricultural Commodities Act, "[f]ailure to pay can result in suspension of a license, and flagrant and repeated failure may result in revocation of a license" (123 Cong. Rec. 35,672 (1977)). With that knowledge, Congress passed the amendment excepting PACA from § 525 of the Bankruptcy law.

Although additional legislative history is somewhat superfluous, there is further strong legislative history consistent with that set forth above.

Shortly before the House agreed to amend § 525 of the 1978 Bankruptcy law by excepting the Perishable Agricultural Commodities Act and the Packers and Stockyards Act from the provisions that otherwise would have precluded license revocations because of bankruptcy or debts dischargeable in bankruptcy, Mr. Panetta stated (123 Cong. Rec. 35,672 (1977)):

> I commend the gentleman from Washington (Mr. Foley), the distinguished Chairman of the Committee on Agriculture, for offering this amendment. As the gentleman knows, I will be offering a complementary amendment with regard to Section 303 that will in effect carry on the basic thrust of the gentleman's amendment.
>
> The Perishable Agricultural Commodities Act is the mainstay of the fresh fruit and vegetable market. What these amendments attempt to do is to restore the authority of the Secretary of Agriculture under that law

Shortly later, and immediately before the House agreed to the amendment excepting the Perishable Agricultural Commodities Act from § 525, Mr. Butler stated (123 Cong. Rec. 35,673 (1977)):

> Mr. BUTLER. Mr. Chairman, I would like to note that Section 525 of the new Bankruptcy Code by its very terms applies only in situations in which governmental units, either in hiring or in administering licensing programs, discriminate solely on the basis of whether a person is, or has been, a bankrupt. The gentleman from Washington (Mr. Foley) correctly points out that the section applies only where the discrimination is practiced "solely" on that basis.
>
> I am told that lawyers at the Agriculture Committee and in the General Counsel's Office at the Department of Agriculture are nevertheless of the opinion that, without clarification, Section 525 might be interpreted to prevent the Secretary from taking necessary regulatory actions under the Perishable Agricultural Commodities Act, the Packers and Stockyards Act and the act of July 12, 1943, 7 U.S.C. § 204. It is difficult for me to understand this interpretation. As noted in our report, it was never the intention of the Judiciary Committee to interfere with legitimate regulatory objectives. However, if Section 525 is susceptible to such interpretations, I am glad of this clarification.
>
> To summarize, § 8 of the Perishable Agricultural Commodities Act (7 U.S.C. § 499h), which authorizes the revocation of a respondent's license because of its flagrant and repeated violations of the Act, was not amended in any manner by the 1978 Bankruptcy law, and is not dependent upon bankruptcy related considerations. To be sure that there could be no

about the matter, § 525 of the 1978 Bankruptcy law was amended to expressly authorize the continuation of the Secretary's license revocation authority under the Perishable Agricultural Commodities Act, even where the proceeding involves debts dischargeable in bankruptcy. Hence even the excuse of a legitimate bankruptcy does not prevent the Secretary from revoking the license of a respondent for payment violations.

Where a seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute full payment, and does not negate a violation of the Act.[20] In *In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. ____ (Apr. 21, 1989), the respondent argued to the contrary, relying on the court's holding in *Marvin Tragash Co. v. USDA*, 524 F.2d 1255, 1258 (5th Cir. 1975), stating:

> The remaining allegations of error are without merit. First, petitioner contends that the written agreement of the creditors to accept 15 per cent of the purchase price under the Chapter XI plan of arrangement satisfied the payment requirement of the Act. This partial payment under the plan entered into some months after the purchases cannot be characterized as either full or prompt payment as required by the Act, 7 U.S.C.A. § 499b(4).

However, nothing in that decision suggests that payment of more than 15% would have constituted the "full or prompt payment as required by the Act" (524 F.2d at 1258).

The respondent in *Joe Phillips* also relied on *Finer Foods Sales Co. v. Block, supra*, 708 F.2d 774, 782 (D.C. Cir. 1983), stating:

> The one extenuating circumstance the Judicial Officer did consider was the petitioner's point that the creditors had accepted the insolvency trustees' distribution of seven percent of their claim "in full satisfaction" of those debts. Such a belated payment of a small portion of a licensee's obligation does not constitute the making of the "full payment promptly" that Section 2(4) requires. *Marvin Tragash Co.*, 524 F.2d at 1258.

Here, again, there is nothing in the court's decision in *Finer Foods* to suggest that payment of anything less than 100% of the amount originally owed would constitute the making of the "full payment promptly" required by

---

[20] *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. ____ (Jan. 27, 1989); *In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1603 n. 1 (1985), *appeal dismissed*, No. 85-1590 (D.C. Cir. Sept. 29, 1986); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1250 (1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1163-65 (1982), *aff'd*, 708 F.2d 774, 782 (D.C. Cir. 1983); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1136 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Kafesak*, 39 Agric. Dec. 683, 685 (1980), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (unpublished), *reprinted in* 41 Agric. Dec. 88 (1982); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 413-14 (1980); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 810 (1978); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633, 1639-40 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1884-87 (1975); *In re M.&H. Produce Co.*, 34 Agric. Dec. 700, 733-40 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1887-88, 1892, 1896, 1899-1900 (1974), *aff'd*, 524 F.2d 1255, 1258 (5th Cir. 1975).

the Act. The administrative decision being reviewed in *Finer Foods* make clear that nothing short of 100% payment satisfies the requirements of Act, notwithstanding an agreement by creditors to accept partial payment full satisfaction of the debts. The decision of the Administrative Law Ju in *Finer Foods*, which was adopted by the Judicial Officer, states (*In re Fi Foods Sales Co.*, 41 Agric. Dec. 1154, 1164-65 (1982), *aff'd*, 708 F.2d (D.C. Cir. 1983)):

> The interpretation of the Act and the policy of the agency in this matt was succinctly set out and reaffirmed in the recent decision of the Judic Officer in *In re Baltimore Tomato Company, Inc.*, 39 A.D. 412 (1980). that disciplinary, action the sellers *had agreed* in negotiated settlements accept less than the full purchase of their shipments. A pertinent part the Decision in that case on pps. 414, 415 states:
>
> > Respondent has failed to make full payments of the agreed purcha prices for produce it accepted and received from 21 sellers in 1 separate transactions. Over $180,000 was left unpaid after the deb were fully discharged under subsequent agreements betwe respondent and the sellers providing for partial payments.
> >
> > It has been held that although acceptance of a partial payment of t purchase price by a seller under such an agreement fully satisfies a extinguishes the debt, it does not constitute "full payment." In re: & H. Produce Co., 34 Agri. Dec. 700, 733-740 (1975), aff'd, 549 F 830 (D.C. Cir. 1977), cert. denied, 434 U.S. 920 (1977). [Footn omitted.]
> >
> > The policy of the Secretary of Agriculture, as established by delegate, the Judicial Officer, requires license revocation as inevitable consequence whenever a licensee under the Act fails, for reason, to make full payment for produce it accepted and rece See In re: M. & H. Produce Co., supra; In re: Sam Leo Catanzaro Agri. Dec. 26 (1976), aff'd sub nom. Catanzaro v. United States, F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agri. Dec. (1977)]; In re: Hal Merdler Produce, Inc., 37 Agri. Dec. 809 (197
>
> The invariability of that consequence has been succinctly stated, b Judicial Officer:
>
> > ". . . the licenses of commission merchants, dealers or broke who fail to pay for produce have been consistently revoked, if the firm was not licensed, a finding has been published th the firm has committed flagrant and repeated violations whi has the same effect on the firm and on those responsib connected with the firm as the revocation of a license." (In L.R. Morris Produce Exchange, 37 Agri. Dec. 1112, 1 (1978)).
>
> Even though a failure to pay in full for produce may be largely circumstances beyond a licensee's control, as apparently is th here, and even though he may be precluded from earning his live in the only business he has known, nevertheless, revocation is uni required. See In re: John H. Norman & Sons Distributing Co

37 Agri. Dec. 705 (1978); and In re: L.R. Morris Produce Exchange, supra, and the cases cited herein. [Footnote omitted.]

The mere fact that a respondent denies that its payment violations were flagrant and repeated does not require that a hearing be held if the record, including bankruptcy documents subject to official notice, shows that the respondent has failed to make full payment exceeding a *de minimis* amount.[21] As stated in *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1590 (1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987):

> As stated above, in view of respondent's bankruptcy admissions and Complainant's Exhibits 1 and 2, it is clear that there is no material issue of fact that warrants holding a hearing. It is not necessary to show that the undisputed facts prove all the allegations in the complaint. The same order would be issued in this case unless the proven violations were *de minimis*.[3]

---

[3]The violations not specifically challenged in the present proceeding amount to over $70,000.
Similarly, in the order denying reconsideration in *Veg-Mix*, it is stated (44 Agric. Dec. at 2060):

> Although the complaint alleges that respondent failed to pay promptly six sellers over $70,000 for 50 lots of perishable fruits and vegetables, the "same order would be issued in this case unless the proven violations were *de minimis*" (Decision and Order at 15-16). Respondent raises no arguments that would have any possibility of reducing the violations to a *de minimis* status and, therefore, detailed discussion of respondent's contentions is not necessary.

The court, in affirming the administrative decision in *Veg-Mix*, states (*Veg-Mix, Inc. v. USDA*, 832 F.2d 601, 607-08 (D.C. Cir. 1987)):

B. *The Failure to Hold a Hearing*

---

[21]*In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. ____, slip op. at 9-10 (Apr. 21, 1989) ("a failure to make full payment (exceeding a *de minimis* amount), because of circumstances peculiar to an individual respondent, is always considered as flagrant," resulting in automatic license revocation (or an equivalent order)); *In re H.M. Shield, Inc.*, 48 Agric. Dec. ____, slip op. at 13 (Feb. 16, 1989) ("there is no need for complainant to prevail as to each of the transactions, since the same order would be entered in any event, as long as the violations are not *de minimis*"); *In re Moore Mktg. Int'l, Inc.*, 47 Agric. Dec. ____, slip op. at 12-13 (Sept. 8, 1988) ("It is well-settled under the Department's sanction policy that the license of a produce dealer who fails to pay more than a *de minimis* amount of produce is revoked, absent a legitimate dispute between the parties as to the amount due"); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1590, *order denying reconsideration*, 44 Agric. Dec. 2060 (1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987); *In re Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (1984) (ruling on certified question) ("unless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the precise amount owed"), *final decision*, 46 Agric. Dec. 83 (1985); *In re Fava & Co.*, 46 Agric. Dec. 79, 81 (1984) (ruling on certified question) (no hearing required unless "the amount presently due and unpaid would be *de minimis*, *e.g.*, less than $5,000"), *final decision*, 44 Agric. Dec. 870 (1985).

1. *Agriculture Department Requirements.* Agriculture Department rules dispense with a hearing when no answer is filed, 7 C.F.R. § 1.139 (1987) [footnote omitted], and Veg-Mix would have us infer from this that under every other circumstance a hearing must occur, regardless of the non-existence of material factual disputes. Since Veg-Mix answered the complaint with a denial of the allegations that some of the transactions were in interstate commerce and denials that some of the transactions were accurately described, it contends that a hearing was required.

This argument strikes us as an utterly implausible application of the ancient maxim *expression unius est exclusio alterius.* Common sense suggests the futility of hearings where there is no factual dispute of substance. Moreover, the agency has previously held that obviously meritless denials and affirmative defenses do not require a PACA hearing, and it placed the burden on the respondent to show a substantial issue requiring a hearing. *In re Fava & Co.*, 44 Agric. Dec. 870 (1985).

The Department's view in *Fava* accords with our rulings that an agency may ordinarily dispense with a hearing when no genuine dispute exists. *See Citizens for Allegan County, Inc. v. Federal Power Commission*, 414 F.2d 1125, 1128 (D.C. Cir. 1969) (Leventhal, J.) ("the right of opportunity for hearing does not require a procedure that will be empty sound and show, signifying nothing"). In *Community Nutrition Institute v. Young*, 773 F.2d 1356, 1364 (D.C. Cir. 1985), *cert. denied*, [475 U.S. 1123], 106 S. Ct. 1642, 90 L.Ed.2d 187 (1986), we suggested that a "request for a hearing must contain evidence that raises a material issue of fact on which a meaningful hearing might be held." *See also Cerro Wire & Cable Co. v. Federal Energy Regulatory Commission*, 677 F.2d 124, 128-29 (D.C. Cir. 1982). Thus we think the agency's approach on the general issue of when a hearing is required was unexceptionable.

Even where a respondent argues correctly that it would be detrimental to its creditors if it were forced to discontinue business, as a result of a license-revocation order, such arguments (frequently made) are routinely rejected. Even where creditors of a respondent personally appear to urge the Department to permit the violator to continue in business, so that the violator will be able to make additional payments to the creditors, the Secretary routinely rejects such pleas for leniency made by creditors since the Secretary must consider the broader public interest, involving thousands of suppliers and licensees throughout the country.[22] If lenient sanctions were imposed in the case of serious and flagrant violations of the Act for the benefit of a few of a particular respondent's creditors, the sanctions would not have a strong deterrent effect and, therefore, such a policy would be contrary to the public interest.

Ignorance of the law has never been regarded as a mitigating circumstance in any of the Department's disciplinary proceedings. As stated in *In re Finger*

---

[22] *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 142 (1984); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151 (1983); *In re Bananas, Inc.*, 42 Agric. Dec. 426, 426-27 (1983) (order denying intervention), *final decision*, 42 Agric. Dec. 588 (1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *aff'd*, 728 F.2d 347, 351 (6th Cir. 1984); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746 n. 6 (1982); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, 574 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977).

Lakes Livestock Exchange, Inc., 48 Agric. Dec. ____, slip op. at 21-22 (Mar. 14, 1989), and *In re Ferguson*, 48 Agric. Dec. ____, slip op. at 56-57 (Mar. 1, 1989):

> Even if respondents were ignorant of the law with respect to their violations, it has never been the policy of this Department to limit severe sanctions to the case of intentional violations, or to violations done with knowledge of their unlawfulness. *See, e.g., In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974). I do not recall any contested case where a respondent has admitted that he knew that he was violating the law. Frequently, I infer that certain conduct was intentional and done with knowledge of unlawfulness (which is done for the benefit of reviewing judges who may dislike my hard-nosed sanction policy), but the sanction would be the same irrespective of those circumstances. *See In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974). In *In re Steinberg Bros. Co.*, 43 Agric. Dec. 1878, 1891 and n. 15 (1984), it is explained that "ignorance of the law is never an excuse or even a mitigating circumstance in a disciplinary proceeding under the Act" because:
>
> > If ignorance of the law were a mitigating circumstance, it would be a disincentive to licensees becoming familiar with the regulatory requirements under the Act, which would tend to thwart the purpose of this remedial legislation.

IV. Lengthy Delays in Making Full Payment in Numerous Produce Transactions Are Repeated and Flagrant Violations of the Act, Warranting a Revocation Order, Unless Full Payment Is Made by the Time of the Hearing, and Respondent Is Then in Full Compliance with the Payment Requirements, with No Agreements for Deferred Payment Beyond 30 Days.

As in the case of failure to make *full* payment, excuses as to why payment could not be made *promptly* are ignored in determining violations or sanctions under the Perishable Agricultural Commodities Act, since "the Act calls for payment -- not excuses."[23]

The serious nature of violations of the Act (7 U.S.C. § 499b(4)) involving failure to pay promptly for perishable agricultural commodities is explained in *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 132-33, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975), as follows:

---

[23] *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486, 489-90 (1987) (delayed payments under color of implied agreements with suppliers), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988) (unpublished; text in WESTLAW); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (delayed payment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1139-40 (1981); *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120 (1978) (delayed payment because of financial difficulties resulting from weather conditions and withdrawal from business of a brother); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 167-68 (delayed payment because of financial difficulties resulting from inexperience, overbuying and credit sales), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 130-31 (delayed payment because of uncollectable accounts), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975).

Failure to pay promptly for perishable agricultural commodities is a serious violation of the Act. As explained by Paul D. Koenigsberg, a witness for complainant (Tr. 50-51):

> A. The law may be referred to as a fair trading act in the produce industry. The law was requested by the industry for its own protection.
>
> Its intent is to suppress unfair or fraudulent practices. And the Act spells out the practices that are to he suppressed or prohibited or are considered violations.
>
> The basic reason is that the produce industry is a fast moving business. It is done on trust and payment must be obtained so that the shipper, let's say, or seller can pay his help, can pay his supplier, who may be a farmer or another packer. The law spells out the terms for such payments. It spells out what may may done to extend time of payment.
>
> Primarily, each dealer is supposed to operate on his own funds and not operate on the funds of his supplier. In being a slow pay or a late pay, the receiver in effect is using the supplier's funds, the supplier's money without having to borrow on his own, without paying interest and in many, many cases forces the supplier to go to other financial sources to obtain funds to be able to pay for his own operations Usually in obtaining these funds that supplier has to get a bank loar and pay interest.
>
> Q. Carrying on that thought, Mr. Koenigsberg, is it your experience in the years you've served with the Perishable Agricultura Commodities Act program that persons who pay late are a severe risl witbin the industry?
>
> A. Yes, it is quite often we have seen persons running up quite history of late pay and then closing the doors, going out of business It left the suppliers witb very faint hope of recovery of the funds. An in very, very many instances the funds that were recovered were ver small percentage of tbe amounts due.

Similarly, in *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 168-69, *per curiam*, 524 F.2d 977 (5th Cir. 1975), it is stated:

> Failure to pay promptly for perishable agricultural commodities is a serious violation of the Act. As explained by Paul D. Koenigsberg, who has been involved with this regulatory program for about 32 years and is in charge of its disciplinary unit (Tr. 18, 26-27):
>
> Q. Okay. Now, in bringing one of these disciplinary proceedings for no payment or slow payment, does the department consider itself as carrying out the desires of the industry or simply is it the department desires to be the regulatory agency?
>
> A. No, sir, the department considers itself a service agency rather than a police agency. It is the industry's desire and has been expressed by the industry nationally any number of times, as a matter of fact, the

national potato counsel just recently at its, I assume, annual meeting, made a question of slow pay, no pay, the first order of discussion and business and quite a large article appeared in the "Packer" of November 17, 1973. I believe that is the correct date. The "Packer" is a trade newspaper.

* * *

Q. Now, going back to the departments in general, why is it that failures to pay promptly are considered serious violations?

A. By a buyer failing to pay the seller promptly quite often the seller is forced to borrow money on the open financial market and pay interest on it. At times if a seller is operating in very close operations he may not be able to get money from a bank or a finance company and we have had any number of occa[s]ions where the sellers have been forced out of business, but [at] the same time with the seller not having enough money to pay his bills, his creditors may be hurt because they can't get paid. The seller can't pay his employees, the creditors can't pay their bills and their employees. It winds up in a vicious cycle, and as I say, quite often some people are forced out of business by that.

The difficulties caused to creditors, when produce debtors fail to make timely payment, was recognized by respondent's attorney (who has had prior experience in other similar cases) and by Michael Caito, co-owner and co-operator of respondent. Respondent's attorney stated in his opening argument (Tr. 10-11):

They have found that they were dealing with people that wanted them to add the name bank after the name Caito Produce and Bank. They found that they couldn't act as a bank. But it has taken them a long period of time first, to realize that they were being used as a bank and secondly, that they had to get rid of these people that were living off of them and in turn living off the produce shippers.

Michael Caito similarly testified (Tr. 75-76):

A. . . . I had three people as was stated earlier that was using Caito Produce Bank, which we filed suit against one.

Q. Using Caito Produce? You mean, signing checks?

A. No, excuse me. Referring, trying to use Caito Produce Company as a bank and not paying in the time schedule frame. I had approximately three customers which we stopped doing business with that we agreed on that, which stopped the cash flow of about $200,000. So, at that time -- should I start over again?

Q. No, no wait. I am confused about your term of bank.

MR. GUDGEON: Let her question you.

BY MS. LASSITER:

Q. You are not saying people came to borrow money from you?

A. Caito sold to people who agreed to terms. That they could r bent with them. Then it was just like a nonpayment. Not a slow payn a nonpayment. I had to use court action with them. These companies, individuals, their balances totaled approximately or more $200,000. I had to use court action to get that money. I was -- so, weary with my business without a $200,000 cash flow.

Just as respondent was damaged by creditors who were using respond a bank, respondent, in turn, was imposing the same type of burden creditors, delaying payment for up to a year. In fact, the investigation case originated "due to several trust notices and reparation complaints against the [respondent] company" (Tr. 15).

Prior to the decision in *In re Gilardi Truck & Transportation, Inc.*, 43 Dec. 118 (1984), it bad been the policy of the Judicial Officer to issue le suspension orders in tbe case of serious "slow payment" cases, usually fr to 90 days.[24]

The administrative officials charged with the responsibility for adminis the Perishable Agricultural Commodities Act have long recomme revocation of a license where there have been many failures to pay prom involving lengthy delays in making full payment. See, e.g., *In re Sout Produce, Inc.*, 34 Agric. Dec. 160, 171-72 (1975), *aff'd per curiam*, 524 F.2 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, *aff' curiam*, 524 F.2d 977 (5th Cir. 1975). There are strong administrative rea supporting their revocation recommendation. Just as in the case of savings and loan industry, if a produce licensee is in financial difficulty not able to pay its creditors promptly), the loss to the industry as a whc frequently much less if the firm is closed down promptly. Furthermore are dealing here with an industry that asked for,[25] pays for,[26] and desi

---

[24] *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. 1930, 1933-37 (1983) (80 days), *aff'* *curiam*, 747 F.2d 1463 (5th Cir. 1984) (unpublished); *In re Alex's Produce*, 41 Agric. Dec. (1982) (70 days); *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372 (1979) (44 days), *per curiam*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *In re Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1119 (1978) (90 days); *In re Southwest Prod Inc.*, 34 Agric. Dec. 160 (70 days), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In Acevedo & Sons*, 34 Agric. Dec. 120 (70 days), *aff'd per curiam* 524 F.2d 977 (5th Cir. 197

[25] "The Perishable Agricultural Commodities Act was enacted at the request of the regul industry." *In re Esposito*, 38 Agric. Dec. 613, 636 (1979).

[26] The Perishable Agricultural Commodities Act regulatory program is the only regula program administered by this Department that is paid for by the regulated industry (through lic fees, 7 U.S.C. § 499e(b), as amended by Act of Aug. 22, 1988, Pub. L. No. 100-414, 102 1102).

[27] See note 18; *In re Esposito*, 38 Agric. Dec. 613, 636 (1979); and S. Rep. No. 2507, Cong., 2d Sess. 3-4 (1956); H.R. Rep. No. 1196, 84th Cong., 1st Sess. 2 (1955) ("In spite of strictness of some of the provisions of the law, the act and its administration by the Departmen Agriculture have won the almost unanimous approval of this important food

a tough regulatory program to insure that only financially responsible licensees are permitted to remain in the industry.[28]

Nonetheless, the Judicial Officer originally refused to issue revocation orders in "slow-payment" cases, preferring to experiment with lengthy suspension orders. As stated in *Southwest Produce, supra*, 34 Agric. Dec. at 172-73:

> The Act authorizes the revocation of a license for "flagrant or repeated" violations. 7 U.S.C. § 499h(a). It may well be that revocation of respondent's license is necessary to serve as an effective deterrent to future similar violations by respondent and by others. However, I would prefer to experiment for a short period of time to determine whether a lengthy suspension rather than revocation, in cases of this nature, will serve as an adequate deterrent. Accordingly, rather than revoking respondent's license, its license will be suspended for 70 days. If experience demonstrates that this does not serve as an adequate deterrent, more severe sanctions will be imposed in future cases involving violations occurring after this decision is filed. In no similar contested case will a shorter suspension period be imposed.[29]

A lengthy suspension order would, of course, make it more difficult for a licensee in financial difficulty to pay promptly. (This is an additional reason supporting the administrative recommendation for a revocation order, rather than a suspension order, where a firm repeatedly fails to pay large sums of money promptly to creditors.) However, a lengthy suspension order may have the salutary effect of compelling a licensee to obtain additional capital, thereby enabling it to pay promptly after its suspension period has expired. Frequently, a licensee that is a corporation, such as the respondent, can obtain additional financing from its owners. If the owners are unable to fund the licensee adequately, there are various alternative sources to be explored, including banks, the Small Business Administration, Small Business Investment Companies, and Venture Capital Network, Inc. (a nonprofit service affiliated with the University of New Hampshire that matches entrepreneurs with investors (603-743-3993)).

In *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118, 149-54 (1984), the Judicial Officer moved a step closer to the views of the administrative officials, holding that in order for a suspension order to be issued on the basis of a "slow pay" case, rather than a revocation order which would be issued in a "no pay" case, full payment must be made by the time of the hearing (or if no hearing is to be held, by the time the answer is due), and the respondent must be in full compliance with the payment requirements by the time of the hearing. *Gilardi* states (43 Agric. Dec. at 149-54):

> Respondent argues that after the hearing in this case, it reduced its debt to about $30,000, which should be paid within the next 30 days (Appeal Brief, at 10). It is established that if a case begins as a "no pay" case, but full payment is made by the time of the hearing, the case becomes a "slow pay" case, which warrants a suspension order rather than a revocation

---

[28]See note 10 and accompanying text.

[29]The identical view was expressed by the Judicial Officer in *Acevedo, supra*, 34 Agric. Dec. at 133-34.

order. *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. [1930 (1983), *aff'd per curiam*, 747 F.2d 1463 (5th Cir. 1984) (unpublished)].

As far as I know, there bas been only one case under the Perishable Agricultural Commodities Act treated as a "slow pay" case in which full payment was made after the hearing. *In re L.R. Morris Produce Exchange, Inc.*, 37 Agric. Dec. 1112, 1119-22 (1978). In that case, full payment was made before the initial decision was issued by the Administrative Law Judge. A 90-day suspension order, rather than a revocation order, was imposed, with the following caveat (37 Agric. Dec. at 1121-22):

> In view of respondent's flagrant violations extending over a period of several years, and involving delays of up to 23 months in payments for over $1 million worth of produce, if respondent knowingly violates the payment provisions of the Act or regulations on one more occasion within the next five years as to a contract entered into on or after the effective date of this Order (which does not involve a bona fide dispute as to the contract), respondent's license will be revoked. If further violations occur which are not knowingly committed, a lengthy suspension order will be imposed.

In a pending case under the Perishable Agricultural Commodities Act, *In re Clarence Miller Co.*, PACA Dockct No. 2-6394, it is alleged on appeal that full payment was made after the initial decision was issued by the Administrative Law Judge.[30] Since the same issue may arise in the present case, perhaps within a few days after this decision is filed, it is appropriate to set forth the policy that will govern in such situations.

There are substantial reasons for making the final determination as to whether a case is "slow pay" or "no pay" as of the date on which the administrative hearing begins. Any determination made after that time would require a new investigation by complainant which might unduly delay the procceding. Each day that tbe payment violations continue results in increased risk and damage to the industry. The inereased damage to existing creditors is obvious--they arc forced to wait longer for their money. The increased risk to others arises from the fact that a firm in financial difficulty frequently increases its volume significantly, perhaps taking imprudent chances, thereby exposing many other unsuspecting persons to the risk of nonpayment, if the debtor's efforts to regain financial stability are unsuccessful. Since there is a considerable time lag between the violations and the hearing, there is no real justification for not making full payment by the opening of thc hearing.

Accordingly, the policy in future cases will be that if full payment is not made by the opening of tbe hearing, together with present compliance with the payment provisions of the Act and regulations (or if no hearing is to be held, by the time tbc answer is due), the case will be treated as a "no pay" case. There is, of course, no basis for considering as mitigating payments that are made by "robbing Peter to pay Paul," *i.e.*, by "rolling

---

[30]Subsequently, the license of Clarence Miller Co. was revoked because its attorney was sent a copy of the *Gilardi* decision, and respondent failed to make full payment within 30 days thereafter, as required in *Gilardi*. *In re Clarence Miller Co.*, 43 Agric. Dec. 529 (1984).

over" the past-due accounts involved in the case, while continuing to violate the payment requirements.[26] (I cannot now conceive of extraordinary circumstances that would warrant further extending the time for making full payment and achieving compliance, but if any exist, they can be considered in a concrete factual setting.)

---

[26]To the extent that there is a bona fide dispute as to the amount due in a particular transaction, it should be excluded from consideration.

However, in view of *Morris*, discussed above, this new policy should not be applied to the present case, or other cases in which the time for converting a "no pay" case to a "slow pay" case would have elapsed before the licensee had an opportunity to learn of the new policy (by publication of this decision in Agriculture Decisions or personal notice of this decision). An interim policy should be followed in such cases.

Under the interim policy, a case may be converted from a "no pay" case to a "slow pay" case by full payment of the debts involved in the case (together with present compliance) not later than (i) the 30th day after (a) publication of this decision in Agriculture Decisions or (b) personal notice of this decision by the respondent or respondent's attorney, or (ii) the time for filing a petition to reconsider the Judicial Officer's decision, whichever occurs first.

The present respondent may assert full payment (and present compliance) in a petition for reconsideration filed within the 10 days permitted in the Rules of Practice (7 C.F.R. § 1.146(a)(3)). This would give respondent sufficient time in which to make full payment since respondent's appeal brief dated December 23, 1983 (filed December 29, 1983), states that full payment should be completed "within the next thirty (30) days" (Appeal Brief, at 10). Moreover, respondent's attorney, Mr. David Hall, was advised by the Judicial Officer in a telephone conversation on January 9, 1984, that if respondent wanted to have full payment considered in determining the sanction in this case, time was "of the essence" since (i) oral argument would probably be denied, (ii) complainant's brief is normally filed within several weeks after an appeal, and (iii) the Judicial Officer is usually fairly prompt in deciding cases.

Where, as here, the hearing has already been held in a case, it is important that this interim policy (which affords a respondent a much longer time period in which to make full payment than the permanent policy to be followed in future cases) not delay the proceeding more than necessary. The proceeding would be delayed too long (resulting in too much increased risk and damage to the industry) if there were a need to reopen the hearing. (In the present case, a reopened hearing would also require a new decision by the Administrative Law Judge, with the opportunity for a further appeal to the Judicial Officer.) Accordingly, under the interim policy, unless complainant files a statement verifying a respondent's full payment and present compliance, payments made after the opening of the hearing will not be considered.

Under this interim policy, complainant will be permitted to determine the facts as to respondent's late payment and present compliance. However, it is presumed that the administrative officials will properly discharge their administrative duties, in this respect. And a respondent is in no position to complain where its proven violations warrant revocation of its license even if full payment is finally made after the opening of the hearing.

For example, in the present case, even if respondent were to make full payment within a few days after the filing of this decision, respondent's violations would, nonetheless, be so flagrant and repeated as to warrant revocation of its license, in view of the large sums of money involved in the violations and the lengthy delays in making full payment. See *Reese Sales Co. v. Hardin*, 458 F.2d 183, 184-87 (9th Cir. 1972) (Judicial Officer properly denied petition for rehearing and reconsideration where respondent's license was revoked for failure to pay $19,059.08 to nine sellers in 26 transactions, and full payment was not made until a few days after the final decision).[31]

The imposition of a suspension order, rather than a revocation order, in flagrant and repeated "slow pay" cases is not mandated by the Act but, rather, is a self-imposed limitation, which is admittedly experimental. *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171-73 (1975), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133-34 (1975), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975). Where a respondent has committed repeated and flagrant violations of the magnitude involved here, this self-imposed limitation would not be followed if a determination as to whether full payment was finally made (long after the hearing) would require the lengthy delay incident to a reopened hearing, a new Administrative Law Judge's decision, and a further appeal to the Judicial Officer.

In the present case, if respondent makes full payment within the period set forth above, and complainant certifies such payment and present compliance, the revocation order will be changed to an 80-day suspension order. *See In re Foursome Brokerage, Inc.*, 42 Agric. Dec. [1930 (1983), *aff'd per curiam*, 747 F.2d 1463 (5th Cir. 1984) (unpublished)]. However, if a new hearing were required to determine full payment and present compliance, the Judicial Officer would follow *Reese* and deny a petition for rehearing or reconsideration, in order to avoid further risk and damage to the industry.[27]

---

[27]The *Reese* case afforded the present respondent an opportunity to learn that under existing policy, full payment made after the final decision would not be considered.

---

[31]Similarly, in *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982), the co held that even if "arrangements had been made with each of the creditors and . . . payments w being made each week on accounts still owed," that would not "prevent the nonprompt payme as being 'repeated' or 'flagrant' so as thus to justify the revocation of a license for violation of prompt-payment regulation."

Following the *Reese* case and refusing to consider respondent's payments made after the filing of this decision would not be imposing a more severe sanction on respondent than on others. But even if a more severe sanction policy were to be adopted in a particular case, without prior warning to the regulated industry, that would be in accordance with the Department's sanction policy, which provides (*In re Worsley*, 33 Agric. Dec. 1547, 1569-70 (1974) (Appendix, at 24a-26a):

> In some cases, following the "deterrent policy" set forth above may lead to the imposition of a sanction more severe than the sanctions previously imposed under the Act for similar violations. If so, uniformity must yield to effectiveness. An effective sanction will be issued in such cases even if it is more severe than sanctions previously imposed for similar violations. In such circumstances, uniformity will be achieved only as to cases subsequent thereto.
>
> In other words, uniformity is a desirable goal; but it is not an absolute requirement. A respondent has no inherent right to a sanction no more severe than that applied to others. *See Hiller v. Securities and Exchange Commission*, 429 F.2d 856, 858-859 (C.A. 2); *G. H. Miller & Company v. United States*, 260 F.2d 286, 296 (C.A. 7), certiorari denied, 359 U.S. 907. As the Court held in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 186: "We read the Court of Appeals' opinion to suggest that the sanction was 'unwarranted in law' because 'uniformity of sanctions for similar violations' is somehow mandated by the Act. We search in vain for that requirement in the statute."
>
> An agency is free to reconsider sanctions previously imposed without prior notice. *Communications Comm'n v. WOKO*, 329 U.S. 223, 228; *Continental Broadcasting v. Federal Comm. Comm'n*, 439 F.2d 580, 582-584 (C.A. D.C.); *N.L.R.B v. Majestic Weaving Co.*, 355 F.2d 854, 860 (C.A. 2); quoted with approval in Davis, *Administrative Law Treatise* (1970 Supp.), § 17.08, p. 604.
>
> In *Communications Comm'n v. WOKO*, 329 U.S. 223, 228, the Court held: "Much is made in argument of the fact that deceptions of this character have not been uncommon and it is claimed that they have not been dealt with so severely as in this case. * * * The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable."
>
> Similarly, in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187, the Court held that the "employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."
>
> As I stated in *In re Sy B. Gaiber & Co.*, Ruling on Reconsideration, 31 Agriculture Decisions 843, 850 (1972):
>
> In any case in which the Judicial Officer determines that the sanctions previously imposed for similar violations are not adequate

> under present circumstances to effectuate the purposes of the regulatory program, a more severe sanction will be imposed in that case, rather than merely announcing that in future cases the sanction will be increased. An administrative agency is free to reconsider sanctions previously imposed without prior notice (see *In re Louis Romoff*, 31 Agriculture Decisions 158, 186, and cases cited therein), and such practice will be routinely followed. Persons who intentionally violate a regulatory program are not playing a game under which they are entitled to consider the sanctions previously imposed for similar violations and determine whether they want to run the risk of detection and the imposition of such a sanction. They run the distinct risk that a more severe sanction will be imposed against them.

The *Gilardi* doctrine was subsequently tightened in *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486, 500-06 (1987), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988) (unpublished; text in WESTLAW), by requiring that respondent's present compliance not involve credit agreements for more than 30 days. *Carpenito* also emphasizes that under *Gilardi*, respondent must be in *compliance* with the payment provisions immediately prior to the hearing--i.e., being almost in compliance is not enough! It is stated in *Carpenito, supra*, 46 Agric. Dec. at 500-06:

> Under the holding in *Gilardi*, respondent's license should be revoked for the 523 violations involved here, unless by the time of the hearing, respondent had made full payment and was in present compliance with the payment provisions of the Act and regulations (*Gilardi*, slip op. at 42-49). Respondent barely met the deadline of paying all of the sellers in full just before the hearing (Tr. 67). However, respondent's license should still be revoked because respondent was continuing to violate the payment provisions of the regulations during the period from April 29, 1985, to October 13, 1985, 4 days prior to the hearing held on October 17, 1985.

In accordance with the holding in *Gilardi*, slip op. at 43-44, quoted at the outset of the conclusions, complainant's investigator, Ms. Myrna Stein, went to respondent's place of business on October 15, 1985, 2 days prior to the hearing, and asked for respondent's unpaid invoices. (Tr. 22, 45-55). She found 143 violations totaling $72,380.70, in which respondent should have made payment up to 5½ months earlier (CX 2-4).

. . . .

> . . . In fact, *Gilardi* does not even say who has the burden of proving respondent's "present" compliance or noncompliance with the payment provisions of the Act and regulations. (At least for the time being, I will leave the burden of proving noncompliance on complainant.) In any event, however, any respondent seeking the benefit of a suspension order rather than a revocation order, under *Gilardi*, is necessarily placed on notice that respondent's present compliance with the payment provisions of the Act and regulations is a matter at issue in the proceeding. . . .

[7]In these circumstances, there is no basis for the ALJ's view that it would have been patently unfair to require respondent to defend complainant's proffered evidence as to the 143 current violations (Initial Decision at 15 - 16). However, if a reviewing court should disagree, it would not aid respondent. If complainant's methodology here, approved by the Judicial Officer, were to be held unlawful, I would change the Department's sanction policy and not give respondents the opportunity to obtain a license suspension, rather than a license revocation, where there have been flagrant and repeated slow-payment violations such as those involved here. Although that would be a more severe sanction policy than that previously followed, it is the long-standing practice of this Department to change the sanction policy, where appropriate, in the pending case, rather than merely to announce that a more severe sanction policy will be followed in future cases. *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. [268, 449-50 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988)]; *In re Worsley*, 33 Agric. Dec. 1547, 1569-70 (1974).

Furthermore, respondent's testimony demonstrates that he has no significant defense to the 143 violations included in complainant's offer of proof [as to whether the respondent was in compliance with the payment requirements at the time of the hearing]. In the first place, in order for the benefits of *Gilardi* to be available to respondent, the evidence would have to show that respondent was in compliance with the payment provisions as to all (or all but a *de minimis* number) of the 143 transactions included in complainant's offer of proof (CX 2-4). This would, as a practical matter, be impossible inasmuch as it was Mr. Carpenito who gave complainant's investigator the invoices which he said were unpaid (Tr. 48-49, 51-54). At best, respondent might have been able to prove that a few of the transactions actually had been paid at that time, or that there were adjustments due on some of the transactions. That evidence would have been insignificant.

Of greatest importance is the fact that respondent admits that at the time the 143 transactions were entered into, he had no *written* agreements with his sellers as to delayed-payment terms. Mr. Carpenito testified (Tr. 133):

. . . .

The written agreements referred to by Mr. Carpenito were signed between October 11 and 15, 1985, which was subsequent to respondent's acceptance of all of the 143 lots of produce involved in complainant's offer of proof. Since respondent admits that there were no *written* agreements for delayed payment when it accepted the 143 lots of produce involved in complainant's offer of proof, respondent was bound by the 10-day payment rule, and there is no possible evidence that respondent could have adduced to disapprove all (or all except a *de minimis* number) of the 143 current violations.

The existence of implied agreements (or even oral, express agreements) for delayed payment relating to the 143 current violations would not affect

the sanction in any manner. That is, the sanction of revocation is being imposed for the 523 violations specifically alleged in the complaint--not for the 143 current violations. Accordingly, we are not concerned with whether there are any mitigating circumstances (such as implied agreements) as to the 143 current violations.[9] Under *Gilardi,*

---

[9]If respondent had been in compliance with the payment provisions of the Act and regulations during the period covered by complainant's offer of proof, the existence of the implied agreements as to the 523 violations in 1983 and 1984 [prior to the amendment requiring written agreements] would have been a mitigating circumstance reducing the sanction from 90 days to 70 days. *In re Hampshire Open Air-Mkt., Inc.*, 41 Agric. Dec. 955, 961 n.2 (1982); *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1117 - 22 (1978).

---

respondent must be in *compliance* with the payment provisions immediately prior to the hearing in order to avoid a revocation order based on its past violations. Being almost in compliance is not enough! And showing mitigating circumstances as to why respondent was not in compliance is not enough! Under *Gilardi*, revocation will be ordered for the past violations unless respondent is in compliance with the payment provisions immediately before the hearing.

. . . .

One final word should be said as to a change in the *Gilardi* policy that I am making in view of the wisdom derived from this case. Although there is no evidence here that Mr. Carpenito obtained the payment statements relied on by respondent (RX A) by using undue influence, I can easily foresee the possibility in a future case that a respondent heavily indebted to suppliers could exact written agreements from them authorizing lengthy payment delays by telling the suppliers that unless they sign such agreements, the respondent's license would undoubtedly be revoked by the Department, and the suppliers would be left "holding the bag" as to the existing indebtedness.

Accordingly, in future cases involving repeated and flagrant slow-payment violations, where a respondent would like to obtain a license- suspension order rather than a license-revocation order, in addition to requiring that full payment must be made by the opening of the hearing, together with present compliance with the payment provisions of the Act and regulations, I will require that respondent's present compliance not involve credit agreements for more than 30 days. This is necessary to prevent respondents in danger of having their licenses revoked from using undue influence in order to obtain written agreements for lengthy credit terms and to prevent the suppliers from either unknowingly giving up the benefit of their trust protection, or knowingly giving up the benefit of their trust protection as the lesser of the evils.

The ALJ suggests that the Department has recently accepted a sanction less severe than previously imposed, stating (Initial Decision at 16 n. 13):

The Department has recently accepted a sanction less severe than revocation in a case involving agricultural produce purchases by a respondent seeking bankruptcy protection. *In re Moore Marketing International, Inc.*, PACA 2-7088, September 8, 1988.

However, the sanction in *Moore Marketing* is basically consistent with, and in one respect even more stringent than, *Gilardi*. In *Moore Marketing*, the Chief ALJ filed a consent decision and order on August 1, 1988, suspending the respondent's license for 30 days, and providing that if the respondent did not pay all known produce creditors within 3 months, and file a $100,000 bond with the Secretary within 1 month, its license would be revoked. The respondent could not obtain the $100,000 bond, and its license was revoked. Giving Moore Marketing 3 months within which to pay all known produce creditors, in order to avoid a revocation order, was consistent with *Gilardi*, which gives a respondent until the time of the hearing to pay produce creditors. Although the 30-day license suspension in *Moore Marketing* was less severe than the customary 70- to 90-day suspension orders in "slow pay" cases, the $100,000 bond requirement was an additional, stringent requirement not provided for under *Gilardi*, which led to the revocation of Moore Marketing's license.

In the present case, respondent was not in compliance with the payment requirements immediately prior to the hearing held April 28, 1988. As to respondent's payment practices at the time of the hearing, respondent had written agreements with only 2 of 21 sellers, and many of the accounts were not paid until over 6 months beyond the time payment was due under the Act and regulations. In fact, the delays in making payment extended to just over 1 year. (Finding 9). Accordingly, respondent's conduct does not come within the principles of the *Gilardi* doctrine that would warrant a lengthy suspension order, rather than a revocation order, for respondent's repeated and flagrant violations of the payment requirements charged in the complaint.

Where, as here, a complaint has been issued charging that a respondent has "violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)), by failing to make full payment promptly to 24 sellers of the agreed purchase prices" (Complaint, ¶ 5), and the respondent continues to violate the Act in the identical manner, even up to the time of the administrative hearing, a revocation order is clearly warranted to carry out the congressional purpose of this remedial statute.

The ALJ observes that the "complaint in this matter, filed December 7, 1987, did not specifically advise the respondent's owners that the Department's regulations require that agreements for deferred payment of produce purchases be in written form" (Initial Decision at 10, Finding 11). However, respondent's answer was filed by an attorney who has had previous experience under this Act. Moreover, if a respondent does not even bother to find out what the regulatory requirements are after a formal complaint is filed, and bring itself into compliance by the time of the hearing, that shows either a complete disregard for the regulatory requirements, or such a distressed financial condition as to warrant immediate revocation, for the protection of the produce industry. (In addition, as shown in § V, I infer from this record that respondent knew of the requirement that agreements for deferred payment be in writing.)

It should be clearly understood that the revocation order issued in this case is not based on respondent's violations of the payment requirements immediately prior to the hearing. The revocation order is based solely on the violations from August 1986 through February 1987 charged in the complaint. As explained above, the violations charged in the complaint warrant a

the sanction in any manner. That is, the sanction of revocation is being imposed for the 523 violations specifically alleged in the complaint--not for the 143 current violations. Accordingly, we are not concerned with whether there are any mitigating circumstances (such as implied agreements) as to the 143 current violations.[9] Under *Gilardi,*

---

[9]If respondent had been in compliance with the payment provisions of the Act and regulations during the period covered by complainant's offer of proof, the existence of the implied agreements as to the 523 violations in 1983 and 1984 [prior to the amendment requiring written agreements] would have been a mitigating circumstance reducing the sanction from 90 days to 70 days. *In re Hampshire Open Air-Mkt., Inc.*, 41 Agric. Dec. 955, 961 n.2 (1982); *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1117 - 22 (1978).

---

respondent must be in *compliance* with the payment provisions immediately prior to the hearing in order to avoid a revocation order based on its past violations. Being almost in compliance is not enough! And showing mitigating circumstances as to why respondent was not in compliance is not enough! Under *Gilardi*, revocation will be ordered for the past violations unless respondent is in compliance with the payment provisions immediately before the hearing.

. . . .

One final word should be said as to a change in the *Gilardi* policy that I am making in view of the wisdom derived from this case. Although there is no evidence here that Mr. Carpenito obtained the payment statements relied on by respondent (RX A) by using undue influence, I can easily foresee the possibility in a future case that a respondent heavily indebted to suppliers could exact written agreements from them authorizing lengthy payment delays by telling the suppliers that unless they sign such agreements, the respondent's license would undoubtedly be revoked by the Department, and the suppliers would be left "holding the bag" as to the existing indebtedness.

Accordingly, in future cases involving repeated and flagrant slow-payment violations, where a respondent would like to obtain a license- suspension order rather than a license-revocation order, in addition to requiring that full payment must be made by the opening of the hearing, together with present compliance with the payment provisions of the Act and regulations, I will require that respondent's present compliance not involve credit agreements for more than 30 days. This is necessary to prevent respondents in danger of having their licenses revoked from using undue influence in order to obtain written agreements for lengthy credit terms, and to prevent the suppliers from either unknowingly giving up the benefit of their trust protection, or knowingly giving up the benefit of their trust protection as the lesser of the evils.

The ALJ suggests that the Department has recently accepted a sanction les vere than previously imposed, stating (Initial Decision at 16 n. 13):

The Department has recently accepted a sanction less severe than revocation in a case involving agricultural produce purchases by a respondent seeking bankruptcy protection. *In re Moore Marketing International, Inc.*, PACA 2-7088, September 8, 1988.

However, the sanction in *Moore Marketing* is basically consistent with, and in one respect even more stringent than, *Gilardi*. In *Moore Marketing*, the Chief ALJ filed a consent decision and order on August 1, 1988, suspending the respondent's license for 30 days, and providing that if the respondent did not pay all known produce creditors within 3 months, and file a $100,000 bond with the Secretary within 1 month, its license would be revoked. The respondent could not obtain the $100,000 bond, and its license was revoked. Giving Moore Marketing 3 months within which to pay all known produce creditors, in order to avoid a revocation order, was consistent with *Gilardi*, which gives a respondent until the time of the hearing to pay produce creditors. Although the 30-day license suspension in *Moore Marketing* was less severe than the customary 70- to 90-day suspension orders in "slow pay" cases, the $100,000 bond requirement was an additional, stringent requirement not provided for under *Gilardi*, which led to the revocation of Moore Marketing's license.

In the present case, respondent was not in compliance with the payment requirements immediately prior to the hearing held April 28, 1988. As to respondent's payment practices at the time of the hearing, respondent had written agreements with only 2 of 21 sellers, and many of the accounts were not paid until over 6 months beyond the time payment was due under the Act and regulations. In fact, the delays in making payment extended to just over 1 year. (Finding 9). Accordingly, respondent's conduct does not come within the principles of the *Gilardi* doctrine that would warrant a lengthy suspension order, rather than a revocation order, for respondent's repeated and flagrant violations of the payment requirements charged in the complaint.

Where, as here, a complaint has been issued charging that a respondent has "violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)), by failing to make full payment promptly to 24 sellers of the agreed purchase prices" (Complaint, ¶ 5), and the respondent continues to violate the Act in the identical manner, even up to the time of the administrative hearing, a revocation order is clearly warranted to carry out the congressional purpose of this remedial statute.

The ALJ observes that the "complaint in this matter, filed December 7, 1987, did not specifically advise the respondent's owners that the Department's regulations require that agreements for deferred payment of produce purchases be in written form" (Initial Decision at 10, Finding 11). However, respondent's answer was filed by an attorney who has had previous experience under this Act. Moreover, if a respondent does not even bother to find out what the regulatory requirements are after a formal complaint is filed, and bring itself into compliance by the time of the hearing, that shows either a complete disregard for the regulatory requirements, or such a distressed financial condition as to warrant immediate revocation, for the protection of the produce industry. (In addition, as shown in § V, I infer from this record that respondent knew of the requirement that agreements for deferred payment be in writing.)

It should be clearly understood that the revocation order issued in this case is not based on respondent's violations of the payment requirements immediately prior to the hearing. The revocation order is based solely on the violations from August 1986 through February 1987 charged in the complaint. As explained above, the violations charged in the complaint warrant a

revocation order. However, the Judicial Officer is temporarily experimenting with a less severe sanction policy where a violator is in compliance with the payment requirements at the time of the hearing.

Since respondent's noncompliance with the payment requirements immediately prior to the hearing is not the basis for the revocation order, but merely precludes the Judicial Officer from reducing the sanction warranted by the earlier violations alleged in the complaint, the issue of willfulness, discussed in the next section, is not relevant to respondent's conduct immediately prior to the hearing. Accordingly, the issuance of the complaint cannot be considered as a warning letter, obviating the need to prove willfulness.

Finally, in affirming the revocation order in a case similar to the present case, *Carpenito Bros., Inc. v. USDA*, 851 F.2d 1500, slip op. at 7 (D.C. Cir. 1988) (unpublished; text in WESTLAW), the court observed:

> Although we uphold the Judicial Officer's sanction, we feel that a word on its severity is in order. We recognize that agencies have wide discretion in fashioning the appropriate punishment for a regulatory violation, *see Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-86 (1973). But it seems to us that revocation is an extremely harsh sanction in this case, albeit not so arbitrary as to justify judicial correction. In holding that revocation was unwarranted, the ALJ noted that petitioner had been in business over 25 years and had dealt with the same individuals about ninety percent of that time. Accordingly, the ALJ held that
>
> > [a] suspension period, which would be held in abeyance while [petitioner] was in full compliance with the Act, would be a severe sanction, would protect the interests of the industry as a whole, would ensure that the trust relationship which exists between members of the industry is maintained and would assure compliance with the provisions of the Perishable Agricultural Commodities Act.
>
> P.A. at 47. We think there is much to be said for this holding. In their zeal to carry out their regulatory mission, agencies must not abandon their duty to ensure that the punishment fits the crime.[32]

However, it should be emphasized that the revocation order in this case is not being issued for any *punitive* reasons. Respondent has done nothing worthy of *punishment*. Respondent has committed no action even remotely resembling a crime. The offenses here were *mala prohibita*--not *mala in se*. There is nothing inherently evil in being unable to pay one's creditors promptly. But, as shown above in §§ II, III and this section, there is no place in the highly-regulated produce industry for a firm that takes up to a year to pay produce shippers, unless *written* agreements for such lengthy credit terms were obtained at the time the contracts were entered into.

---

[32]This unpublished decision is quoted only because the ALJ quotes the last sentence in his Initial Decision.

V. Respondent's Violations Were Willful.

Under the Administrative Procedure Act, a revocation or suspension order cannot be issued unless the violations were willful or a prior warning letter was sent. Specifically, the Act provides (5 U.S.C. § 558(c)):

> Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given--
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

The ALJ held that respondent's violations of the Act were not willful and, therefore, that a revocation order is not authorized by the Administrative Procedure Act (Initial Decision at 6-7, 10-13, 16-31).[33] The ALJ's holding is based on his view that respondent's owners thought that *oral* contracts for deferred payment complied with the Act, and that there is no evidence that they knew that written agreements for deferred payment were required until the day of the hearing, April 28, 1988. The ALJ also thought that, since respondent's owners unsuccessfully *attempted* to obtain written agreements, its conduct cannot be regarded as willful. The ALJ's entire Initial Decision and Order is set forth in Appendix C. The ALJ states, *inter alia* (Initial Decision at 7, 10-11, 13, 25-27, 29-30):

> The record does, however, clearly display oral agreements between officers of respondent and representatives of the vendors identified in the complaint by which agreements the respondent's officers believed they had been authorized to pay for purchases of produce on extended or deferred terms, thereby obtaining compliance with the statute. Since respondent's officers had entered into these oral agreements, it would be a contradiction to conclude that willfulness, as the term is used in the Administrative Procedure Act, had been manifested in the violation of the statute.
>
> . . . .
>
> 11. . . . The respondent's bookkeeper, as of the date of the hearing, did not know that the Department's Regulations require that agreements extending payment terms must be in writing. (TR 88-89) However, as of the date of the hearing, April 28, 1988, the respondent's owners knew that extensions of terms for the payment of produce are, according to Department of Agriculture regulations, to be evidenced by written agreements. (TR 79-80) Hence, there is no evidence in this record that

---

[33]If the ALJ's determination as to a lack of willfulness were correct, the ALJ's 30-day suspension order would have been barred by the Administrative Procedure Act, notwithstanding the fact that he suspended the effectiveness of the suspension order pending respondent's compliance with the Act.

the respondent's owners knew, at any time prior to April 28, 1988, that the Department's Regulations require that agreements of this type be in written form.

12. This record does not contain any evidence that the Department's investigators or attorneys ever advised the respondent or its owners, in writing, or by oral communication, that it would be considered a violation of the Act, as interpreted by the Department's regulation, to fail to obtain consents, as evidenced by written agreements, to pay for produce purchases on deferred terms. This record also does not contain any evidence that the Department's investigators or attorneys ever gave respondent an opportunity to comply with the Act by observing the Department's Regulations.

. . . .

. . . The respondent's business focuses on the sale of products which arrive at its stalls in Columbus, Ohio in less than prime condition, as "rollers" (TR 108) in need of "rehabilitation." (TR 98) As such, it is entirely suitable to perceive a commerce inclined to substantial post-shipment and invoicing negotiation and prepares the stage for the oral agreements which the owners and officers of respondent believed were sufficient to evidence compliance with the Act. . . .

. . . .

This testimony [Tr. 65-68, 97-99] and the record in its entirety permit the conclusion and finding that the respondent did indeed violate the Act by its failure to obtain written agreements deferring the prompt payment for produce purchases. However, the testimony and entire record do not permit the conclusion that the respondent's failure to obtain such agreements in writing constituted willful violations. Indeed, the display by respondent's officers in their efforts to obtain agreements in writing is found in the following testimony: (TR 103-104)

Q. One particular question. With regard to the oral agreements which you personally negotiated either before or after receipt of the produce, did you ever reduce those of your understanding with regard to those oral agreements in writing and send a letter to the shippers reflecting that?

A. In several cases, we had asked the shippers if they would send in writing. One or two of them did. Others said, 'We will go along with this oral agreement, but we would prefer to not put it in writing.' Some were reluctant to put it in writing, but felt satisfied with the agreement that we had made.

This testimony supports the conclusion that respondent's failure to obtain written agreements by which it could defer payments for produce purchases violated the Act, which extends no leeway for non-compliance. The statute calls for a *per se* interpretation. However, the testimony cited above establishes that attempts to comply with the statute, by express oral agreements for the deferred purchase of produce are sufficient to conclude

that respondent's officers did not display intent or careless disregard in accomplishing the violations. . . .

The Department's Judicial Officer has addressed the nature of allegedly oral contracts for the deferred payment for produce purchases. *In re Carpenito Bros., Inc.*, [46 Agric. Dec. 486 (1987), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988) (unpublished; text in WESTLAW)], and *In re Gilardi Truck and Transportation, Inc.*, 43 Agric. Dec. 118 (1984). In both those cases, the allegedly oral agreements were considered as but elements in determining the existence of violations of the PACA. In this matter, the oral agreements are considered not as manifestations of statutory non-compliance, but rather as displays of failed attempts to comply with the statute and regulations. Here, the respondent is found to have violated the Act; and hence, the issue is the effect of the proven agreements upon the scope of the sanction.

. . . .

The cases upon which complainant's counsel relies, and other precedent, leads to the conclusion that the tenants [sic] of the Administrative Procedure Act have not been observed by the Department. The *Parchman* and *Capitol Packing* cases suggest a finding of "willfulness" if there has been an intentional misdeed or such gross neglect as to reveal an intent to perform that misdeed. The *American Fruit*, *Holt*, *Goodman* and *Speight* cases[26] permit a disjunctive finding of "willfulness" should intent be amorphous, if the respondent's misdeed were committed in careless disregard of the statute.

---

[26]The mandates of *Holt*, *American Fruit*, *Goodman* and *Speight* cases must be applied by the Administrative Law Judge in this matter. *Mattes v. U.S.*, 721 F.2d 1125, 1129 (7th Cir. 1983), *In re Samuel Esposito*, 38 Agric. Dec. 613, 663-65 (1979).

It is clear that the Department's counsel has not sustained the burden of proof, as required by *Lawrence v. Commodity Futures Trading Commission*, 759 F.2d 767 (9th Cir. 1985) that respondent intended to violate the statute. Nor, did counsel sustain the burden of proof in the disjunctive, that respondent's actions as performed by its corporate officers manifested a careless disregard of the Perishable Agricultural Commodities Act.

"Willfulness" has not been proven in this case. Officers of respondent displayed attempts to obtain the written agreements (TR 104), which the Department charges are necessary to legally defer payments for produce purchases. These officers contacted their suppliers and asked for written confirmation of their agreements. Hence, they intentionally attempted by acts of commission to obtain the proof which the Department contends by acts of omission to be a display of "willfulness." If the Department wished to avoid the expense of delivering a written notice to the respondent

advising the respondent that a violation was perceived,[34] it should have been prepared to prove the intent of officers of respondent, as required by both *Capitol Packing, id,* and *Goodman, id,* cases, or in the alternative, the Department should have advanced proof that officers of respondent acted in careless disregard of the statutory requirements, as suggested by the *Goadman, id,* line of cases. However, counsel supporting the complaint have not sustained the burden of proof in this regard.

Therefore, since the record fails to disclose that the Department provided written notice of perceived violations, and since the record does not disclose willfulness as an alternative element, the Administrative Procedure Act, 5 U.S.C.A. § 558(a)-(c) precludes the revocation of respondent's license as a result of this proceeding.

I disagree with the ALJ's view as to the law and the facts relating t respondent's willfulness. (Furthermore, respondent's counsel, who h appeared in other similar cases, apparently saw no merit in the willfulne issue prior to the ALJ's decision, since he "chose to not brief the 'wilfulnes issue before the Administrative Law Judge" (Initial Decision at 18 n. 15)).

Respondent's violations were willful, within the meaning of that term in th Administrative Procedure Act. As stated in *George Steinberg & Son, Inc. v Butz*, 491 F.2d 988, 994 (2d Cir. 1974) (affirming my decision in *In re Geor Steinberg & San, Inc.*, 32 Agric. Dec. 236 (1973), in a case involving payme violations under the Perishable Agricultural Commodities Act), *cert. denie* 419 U.S. 830 (1974):

> It is clear enough that under § 9(b) [5 U.S.C. § 558(c)], doing an act which is prohibited and doing it intentionally "irrespective of evil motive or reliance on erroneous advice" or "acts with careless disregard of statutory requirements" are willful. *See* Goodman v. Benson, 286 F.2d 896, 900 (7th Cir. 1961); *see also* United States v. Illinois Central Railroad Co., 303 U.S. 239, 243, 58 S.Ct. 49, 82 L.Ed. 518 (1938).

Similarly, in *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961), a cas I briefed and argued in the Court of Appeals, the court held:

> Petitioner urges his denial of trading privileges amounted to u suspension of a license, and that Section 9(b) of the Administrative Procedure Act, 5 U.S.C.A. § 1008(b) [now 5 U.S.C. § 558(c)], was violated. We do not reach that question for the same section excludes cases of wilfulness. We hold the petitioner's conduct was wilful within the meaning of section 9(b) of the Administrative Procedure Act. We think it clear that if a person 1) intentionally does an act which is prohibited,--irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements, the violation is wilful. Eastern Produce Co. v. Benson, 3 Cir., 278 F.2d 606, 609.

---

[34] An administrative determination not to send a warning letter is never based on the "expens of delivering a written notice," but, rather, on the need for prompt action to eliminate a danger the produce industry. As stated in § IV, complainant's first knowledge of respondent's violation came from the filing of reparation actions and trust claims against respondent (Tr. 15).

In *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1983) affirming my decision in *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154 1982), involving payment violations under the Perishable Agricultural Commodities Act, which contains a great part of the identical language used n this decision), the court expressed the same view, stating:

"Under [the Perishable Agricultural Commodities Act],[35] an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980). *See also George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830, 95 S. Ct. 53, 42 L.Ed.2d 55 (1974). The Judicial Officer had ample basis for concluding that the petitioner's violations of the Act were willful.

In *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981), involving payment violations under the Perishable Agricultural Commodities Act, the court agreed with the foregoing doctrine, holding:

Under PACA, an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *Haltmier v. Commodity Futures Trading Commission*, 554 F.2d 556, 562 (2d Cir. 1977); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir. 1974), *cert. denied*, 419 U.S. 830, 95 S. Ct. 53, 42 L.Ed.2d 55 (1974).

In *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960), a case arising under the Perishable Agricultural Commodities Act, which I briefed and argued in the Court of Appeals, the court held that evil purpose or criminal intent is not necessary to support a finding of willfulness, stating:

It is clear that where willfulness can be shown on the part of individuals violating valid regulations, license suspension is authorized without resort on the part of the agency to notice and opportunity for compliance. 5 U.S.C. § 1008(b). Petitioners assert that the record does not support a finding of willfulness and that the Judicial Officer's conclusion to this effect is inconsistent with his finding of neglect on the part of the petitioners. A fair reading of the Decision and Order rendered by the Judicial Officer indicates that this argument is in great measure semantical. The Decision states: "At the least, underpayment to the shippers involved herein, including Peninsula, in many transactions over a five-month period demonstrates such neglect of the requirements of the act as to constitute willful violations thereof. We conclude that Eastern's willful failures to account truly and correctly and to make full payment promptly to shippers in the many transactions involved herein constitute repeated and flagrant violations of Section 2 of the act." This is not equation of neglect and willfulness but, on the contrary, a finding, although perhaps unartfully phrased, that notorious neglect of explicit provisions of law may be evidence of willfulness. Nor can we subscribe to the

[35]The bracketed material is in the court's decision.

proposition that the test of willfulness in this context is to be evil purpose or criminal intent, for this is not a criminal statute. As the Supreme Court stated in United States v. Illinois Central R. Co., 1938, 303 U.S. 239, 242-243, 58 S. Ct. 533, 535, 82 L.Ed. 773:

"* * * In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in United States v. Murdock, 290 U.S. 389, 394 [54 S. Ct. 223, 225, 78 L.Ed. 381], shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'"

We are convinced that the provisions of the Commodities Act are clear, and the repeated violation thereof by the petitioners fully justified the finding of willfulness by the Judicial Officer.

The definition of willful under the Administrative Procedure Act is discussed at length in *In re Shatkin*, 34 Agric. Dec. 296, 297-314 (1975). The cited pages from *Shatkin* are set forth as Appendix D to this decision.[36]

In *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 186-88 (1973), the Court expressly held that registrants may be suspended under the Packers and Stockyards Act (7 U.S.C. § 204) for negligent or careless violations that are not intentional or flagrant, stating:

The Secretary may suspend "for a reasonable specified period" any registrant who has violated any provision of the Act. 7 U.S.C. § 204. Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application in cases of negligent or careless violations. Rather, the breadth of the grant of authority to impose the sanction strongly implies a congressional purpose to permit the Secretary to impose it to deter repeated violations of the Act, whether intentional or negligent. *Hyatt v. United States*, 276 F.2d 308, 313 (CA 10 1960); *G.H. Miller & Co. v. United States*, 260 F.2d 286 (CA 7 1958); *In re Silver*, 21 Agric. Dec. 1438, 1452 (1962).[5]

---

[5]It is by no means clear that respondent's violations were merely negligent. The hearing examiner found that respondent had "intentionally"

---

[36]*Shatkin* explains (34 Agric. Dec. at 306-14) that the decision in *Economou v. USDA*, 494 F.2d 519 (2d Cir. 1974), which held that the violations under the Commodity Exchange Act were not willful because the "customary warning letter" was not sent, is erroneous because it nullifies the willfulness exception in the Administrative Procedure Act. My decision in *In re Economou*, 32 Agric. Dec. 14 (1973), *rev'd*, 494 F.2d 519 (2d Cir. 1974), explaining that Arthur N. Economou willfully failed to meet the minimum financial requirements of the Commodity Exchange Act by puffing up assets and underreporting liabilities in transactions with commonly controlled companies, including the American Board of Trade, had it not been reversed by the court, would have sounded the death knell of the American Board of Trade (according to Mr. Economou (32 Agric. Dec. at 125)), before investors put in about $79 million. The American Board of Trade recently went broke costing investors about $49 million. See The Wall Street Journal, Feb. 3, 1987, at 50, col. 3.

underweighed livestock, and the Judicial Officer stated: "We conclude then, as did the hearing examiner, that respondent *wilfully* violated . . . the act." (Emphasis added.) "Wilfully" could refer to either intentional conduct or conduct that was merely careless or negligent. It seems clear, however, that the Judicial Officer sustained the hearing examiner's finding that the violations were "intentional."

The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases. *FCC v. WOKO*, 329 U.S. 223, 227-228 (1946); *FTC v. Universal-Rundle Corp.*, 387 U.S., at 250, 251; *G.H. Miller & Co. v. United States*, *supra*, at 296; *Hiller v. SEC*, 429 F.2d 856, 858-859 (CA 2 1970); *Dlugash v. SEC*, 373 F.2d 107, 110 (CA 2 1967); *Kent v. Hardin*, 425 F.2d 1346, 1349 (CA 5 1970).

Moreover, the Court of Appeals may have been in error in acting on the premise that the Secretary's practice was to impose suspensions only in cases of "intentional and flagrant conduct." [Footnote omitted.] The Secretary's practice, rather, apparently is to employ that sanction as in his judgment best serves to deter violations and achieve the objectives of that statute. Congress plainly intended in its broad grant to give the Secretary that breadth of discretion. Therefore, mere unevenness in the application of the sanction does not render its application in a particular case "unwarranted in law."

The ALJ, in holding that respondent's conduct was not willful, in part because respondent's personnel did not know that written agreements for deferred payment were required by the Act and regulations, apparently relied on *Parchman v. USDA*, 852 F.2d 858, 864-65 (6th Cir. 1988), and *Capitol Packing Co. v. United States*, 350 F.2d 67, 78 (10th Cir. 1965).[37] But neither case holds that knowledge of a regulation is an indispensable element of willfulness.

In *Parchman v. USDA*, 852 F.2d 858, 864-65 (6th Cir. 1988), the court did not sustain the ALJ's determination, adopted by the Judicial Officer, that the respondents had willfully weighed livestock at less than their true and correct weights, citing *Capitol Packing Co. v. United States*, 350 F.2d 67, 78 (10th Cir. 1965). However, no issue was presented in *Parchman* as to whether knowledge of the regulations was necessary to sustain a finding of willfulness. In *Parchman*, respondents admittedly knew that they were required by the Act and regulations to weigh livestock accurately. They contended that they tried to do so. The determination of the ALJ, adopted by the Judicial Officer, was that the respondents' conduct was willful, inasmuch as they "deliberately weighed animals at less than their true and correct weights" (*In re Parchman*, 46 Agric. Dec. 791, 796 (1987)). Although that determination was not upheld by the court (852 F.2d at 846-65), the court's decision in this respect was not based on respondents' ignorance of the law as to the requirements for

---

[37]Although the ALJ gives lip service to deciding the willfulness issue on the basis of "*Holt, American Fruit, Goodman* and *Speight*" (Initial Decision at 29 n. 26), his decision as a whole is slanted towards the language of *Capitol Packing Co.*, without recognizing that under the square holding in *Capitol Packing Co.*, where there is an express regulation, the Department is not required to prove that the violator knew of the regulation.

accurate weighing. Accordingly, *Parchman* does not stand for the proposi
that knowledge of the Act or regulations is an indispensable element
willfulness.

Similarly, *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th C
1965), does not hold that knowledge of the Act or regulations is a necess
element of willfulness. In fact, in *Capitol Packing Co.*, the court found
willful violation where the respondents violated an express regulation ev
though there is nothing in the case to show that the respondents were aw
of the regulation.[38] Since an appeal in this case lies to the same circuit th
decided *Parchman*, and Parchman relies on *Capitol Packing Co.*, it i
appropriate to examine *Capitol Packing Co.* in detail. The court states i
Capitol Packing Co. (350 F.2d at 78-79):

> There is no contention that 5 U.S.C.A. § 1008(b) [now 5 U.S.C. § 558(c)]
> is not applicable or that the written notice provisions thereunder were
> satisfied in this proceeding. There is no specific finding of wilfulness by
> the Judicial Officer. Therefore, for the suspension to be sustained, it must
> be shown by the facts found by the Judicial Officer that the violation was
> wilful.
>
> To demonstrate that the appellants wilfully violated the Packers and
> Stockyards Act, the Government in its argument relies on two stipulations
> entered into in 1947 and 1954 by Sol Felsen, Al Cooper, Harry Hoyt, and
> Morey Miller, doing business as Farmers Livestock Commission Company,
> in which the registrants admit numerous violations of the Act and agree
> to cease and desist from further violations. However, none of the
> violations which the registrants admitted at that time were charged in this
> action.
>
> Next the Government argues that wilfulness is shown because the
> petitioners intentionally committed a prohibited act, citing Goodman v.
> Benson, 286 F.2d 896 (7th Cir.), that:
>
> "We hold the petitioner's conduct was wilful within the meaning of
> Section 9(b) of the Administrative Procedure Act. We think it clear
> that if a person 1) intentionally does an act which is prohibited,--
> irrespective of evil motive or reliance on erroneous advice, or 2) acts
> with careless disregard of statutory requirements, the violation is
> wilful."
>
> The court in the cited case found however that the defendant's violations
> constituted clear violations of the Act and that he was not acting in good
> faith. The remainder of the cases cited by the Government in support of
> its interpretation also show a gross disregard of the law. For example, in
> Eastern Produce Co. v. Benson, 278 F.2d 606 (3d Cir.), the court made a
> finding that the defendant's actions constituted "notorious neglect of
> explicit provisions of law"; in Great Western Food Distributors v. Brannan,
> 201 F.2d 476 (7th Cir.), cert. den. 345 U.S. 997, 73 S.Ct. 1140, 97 L.Ed.

[38] In the present case, as in *Capitol Packing Co.*, the Act permits a sanction only for a violation of the Act--not for a violation of the regulations (7 U.S.C. §§ 204, 213(b), 499h). But here, as in *Capitol Packing Co.*, the regulations expressly delineate the precise conduct that is prohibited by the Act.

1404, the defendant had attempted to corner the egg market; in Air Transport Associates v. Civil Aeronautics Board, 91 U.S.App.D.C. 147, 199 F.2d 181 (D.C. Cir.), cert. den. 344 U.S. 922, 73 S.Ct. 386, 97 L.Ed. 710, the court found written warnings from enforcement officers and the defendant's replies sufficient to show wilfulness. Schwebel v. Orrick, 153 F.Supp. 701 (D.C.C.), aff'd. on other grounds 102 U.S.App.D.C. 210, 251 F.2d 919 (D.C. Cir.), contains statements on the issue which are not persuasive because the court found compliance with the written notice requirements of § 9(b).

An examination of the cases cited above leads one to the conclusion that they support the interpretation of "wilfulness" contended for by appellants, that is, an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof. This interpretation receives support from the legislative history of the Administrative Procedure Act. As stated in the House Report on the Act, in discussing § 9(b):

> "The exceptions to the second sentence, regarding revocations, apply only when the demonstrable facts fully and fairly warrant their application. Wilfulness must be manifest." H.R.Rep.No.1980, 79th Cong., 2d Sess. 41 (1946).

See also, S.Rep.No.752, 79th Cong., 1st Sess. 25 (1945), 92 Cong.Rec. 5654 (remarks of Congressman Walter).

However, even under the appellant's definition of "wilfulness," it would appear that the refusal to sell off top loads was a wilful violation of the Act and regulations thereunder since it was in disregard of a specific regulation.

Although this Department follows the holdings in *George Steinberg*, *Goodman*, *Eastern Produce*, and *Finer Foods Sales Co.* as to willfulness (all involving the Perishable Agricultural Commodities Act) rather than *Capitol Packing Co.*,[39] the square holding in *Capitol Packing Co.* is that a violation is willful if the conduct is "in disregard of a specific regulation" (350 F.2d at 79) (last sentence quoted above). There is nothing in the court's decision in *Capitol Packing Co.* to suggest that the respondents were aware of the regulation making their refusal to sell off top loads unlawful. The court's entire discussion as to the refusal of these respondents to sell off top loads is as follows (350 F.2d at 73-74):

> 1. Top Loads.
>
> As stated above the Judicial Officer found a refusal on the part of the market agency to sell its better quality consignments separately from other consignments. The strongest evidence on this point is the affidavit of an official and buyer of the Capitol Packing Company, one of the largest purchasers from Farmers Livestock Commission Company, and a party in the companion case, stating in part as follows:

---

[39] *See, e.g., In re Shatkin*, 34 Agric. Dec. 296, 298-314 (1975) (Appendix D at 1a-7a); *In re Speight*, 33 Agric. Dec. 280, 302-03 (1974).

"I attempt to buy in all alleys where there is livestock I can use. Some of the commission firms sell off the top loads to other packers. I won't buy in alleys where the top loads have been sold off. If I get first turn in an alley, I usually bid on all the cattle and will buy the whole alley if I can. I buy considerable cattle in Farmers alley because they have the kind of cattle I want, and I can buy the top cattle along with the other cattle."

This evidence is not refuted by appellants. Also Mr. Anton J. Plute, a buyer for another packer, testified he had encountered some trouble purchasing from Farmers, because he had wanted to pick top loads.

The Judicial Officer found this practice of the commission men to be a violation of § 302(a) of the Act[40] and 9 C.F. § 201.58 (22 Agric. Dec. at p. 678). 9 C.F.R. § 201.58 requires sales of each consignment to the highest bidder without intermingling them, and not conditioned on sales of other consignments.[1]

---

[1]"Every market agency and licensee engaged in the business of selling livestock or live poultry on a commission or agency basis shall offer the livestock or live poultry consigned to it for sale on the open market and shall sell such livestock or live poultry at the highest available bid. * * * A market agency or licensee shall not make the sale of one consignment of livestock or live poultry conditional on the sale of another and different consignment of livestock or live poultry without the consent of the owners."

The consent of the owner of the cattle consigned provides an exception in the regulation's prohibitions, but there is no evidence that Farmers obtained the owners' consent in refusing to sell off top loads. The practice by appellants is therefore in violation of the regulation and the Act.

The evidence supporting the Judicial Officer's finding that Farmers refused to so sell its top loads of steers separately is clear and uncontradicted.

In addition, there is nothing in any of the briefs filed with the court in *Capitol Packing Co.* by any of the parties to suggest that the respondents knew of the regulation making unlawful their refusal to sell off top loads of livestock. Furthermore, there is nothing in the Judicial Officer's original decision in the case or in his decision on reconsideration (which I argued before the Judicial Officer) to suggest that the respondents had any knowledge of the regulation making unlawful their refusal to sell off top loads. *In re Capitol Packing Co.*, 22 Agric. Dec. 651, *order on reconsideration*, 22 Agric. Dec. 1234 (1963). In fact, there is no discussion by the Judicial Officer as to willfulness. As recognized in the brief filed in the 10th Circuit by the

---

[40]The statutory reference should be to § 312(a) of the Act (7 U.S.C. § 213(a)), prohibiting any "unfair, unjustly discriminatory, or deceptive practice or device" (*In re Capitol Packing Co.*, 22 Agric. Dec. 651, 678 (1973)).

suspended registrants in *Capitol Packing Co.* (Brief of Appellant-Petitioners in No. 7611, at 30-31), the closest the Judicial Officer came to any statement remotely connected with willfulness is the following statement (22 Agric. Dec. at 694):

> We agree with this but we also conclude that the suspension periods for the remaining respondents registered should be considerably less than recommended since some charges have not been sustained and because the violations are more in the nature of *mala prohibita* than *mala in se*.

Accordingly, the square holding in *Capitol Packing Co.* is that if a respondent violates the express provisions of a regulation, the conduct is willful, within the meaning of the Administrative Procedure Act, without any proof whatever that the respondents knew of the regulation. I am not sure whether the court in *Capitol Packing Co.* regarded the violation of the express provisions of the regulation as an "intentional misdeed" (i.e., the intentional commission of an act clearly in violation of a regulation) or "gross neglect of a known duty" (i.e., a duty known to the industry because of a regulation). All I know for sure is that the court in *Capitol Packing Co.* did not require any showing by complainant that the respondents knew of the express regulation involved in that case.

To conclude this case-law analysis of the willfulness issue, where there is a violation of an express regulation, it makes no difference whether the *George Steinberg*, *Goodman*, *Eastern Produce* and *Finer Foods* line of cases is followed or the *Capitol Packing Co.* decision is followed. But a different outcome could be reached in the absence of an express regulation. For example, where the alleged misconduct does not clearly violate the Act, and there is no express regulation violated, assuming that a reviewing court agreed that the alleged misconduct did in fact violate the Act, the intentional doing of the act would be willful under *George Steinberg et al.*, but perhaps not under *Capitol Packing Co.*

In the present case, respondent violated express regulatory requirements. Respondent has voluntarily chosen to engage in a highly regulated business. It is its responsibility, as a licensee under the Act, to keep itself informed as to all of the provisions of the Act and regulations. Complainant does not have to prove, as an element of willfulness, that respondent actually knew of the regulatory requirements.

The ALJ's holding in this case, requiring, as an indispensable element of complainant's proof as to willfulness, proof that respondent had knowledge of the applicable regulatory provisions, would seriously impair not only this regulatory program, but also the similar regulatory program for the livestock, poultry and meat industries under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*). Such a holding would place a premium on a licensee's remaining ignorant of all regulatory requirements. A licensee would be foolish to make any effort to learn of regulatory requirements.

Assuming, however, that a reviewing court agrees with the ALJ, the respondent should have the obligation to allege and prove (at least initially) lack of knowledge of the regulatory requirements. (If complainant had the burden of proof, a respondent could, by merely refusing to testify at the hearing or attend the hearing, ordinarily preclude the government from proving that respondent knew of the regulatory requirements.)

In any event, however, I infer, based on the record in the present case, that respondent's owners knew that written agreements for deferred payment were

required. Michael Caito, one of the co-owners and co-operators of respondent, testified (Tr. 79-81) (emphasis added):

Q. *Do you understand the provision of the Act which calls for a written credit agreement to specify the date on which full payment must be made beyond the ten days?*

A. *Yes.*

Q. *That's what I mean by extended payment, a written agreement.*

A. *I have oral agreements for extended payments.*

MS. LASSITER [for complainant]: Okay. That's what I understand. I have no further questions.

JUDGE KANE: Any redirect, counsel?

BY MR. GUDGEON [for respondent]: Just so that -- I want to make sure.

Q. When you say extended terms from these various shippers, would your understanding be that you would pay the full invoice on a specific date or not?

A. It would be a combination of both.

Q. And what do you mean by a combination of both?

A. It would be some on extended terms of 30 days or 60 days.

Q. For payment in full?

A. Payment in full. Other people would be partial payments.

Q. Meaning?

A. They would agree to it by selling that way.

Q. In other words, you would pay them like $100, or $500, or $1,000.

A. A percentage; yes, sir.

Q. And would they even vary within a particular creditor?

A. Yes.

Q. *But then this is not in writing; is that right?*

A. *No, sir.*

JUDGE KANE: Any recross, Ms. Lassiter?

MS. LASSITER: No, your Honor, I have no further questions.

JUDGE KANE: Thank you for your testimony, Mr. Caito. You are excused.

I construe Michael Caito's testimony, just quoted, to refer to his understanding of the regulatory requirements at the time the transactions involved in the case occurred--not as to his understanding on the day of the hearing. His testimony is certainly susceptible to my construction, and if Michael Caito did not know of the regulatory requirements at the time of the violations, his attorney, Mr. Gudgeon, would undoubtedly have clarified the matter, to show that although Michael Caito testified that he understands the requirement for a written credit agreement, he did not have such knowledge at the time of the relevant transactions. Instead, the redirect examination by respondent's attorney merely emphasized that respondent's agreements were not in writing.

Samuel Caito, respondent's other co-owner and co-operator, testified in the proceeding, but no questions were asked of him by either counsel as to his knowledge of the regulations requiring written credit agreements for deferred payment. Furthermore, as stated above, respondent's attorney, in briefing the matter before the ALJ, did not contend that respondent's co-owners and co-operators did not know, at the time of the violations, of the requirement for a written contract for deferred payment. Respondent's attorney explained the failure to obtain written contracts on the reluctance on the part of the sellers to admit they were not selling top quality merchandise, rather than on any lack of knowledge of the requirement for written contracts. His brief states (Brief filed July 7, 1988, at 2):

> The suppliers of Respondent were aware of the fact that they would not be paid for their merchandise within the statutory ten-day period. They were more than aware that the merchandise they were sending could not be classified as the "top of the crop," or anything approaching it. It is quite true that Respondent should have protected itself by getting agreements in writing for the extended payment terms orally agreed to, but it didn't. A natural reluctance on the part of the sellers to concede or admit they were not selling top quality precluded such a written agreement prior to the shipment of the merchandise as called for by the regulations. As stated by Sam Caito, his firm was one of the few in central Ohio which was willing to handle, to use an euphemistic term, "distressed" merchandise and remit something above freight charges to the shipper.

Samuel Caito testified that only one or two shippers entered into written agreements for deferred payment, and that some were reluctant to put agreements for deferred payment in writing. He testified (Tr. 103-04):

> JUDGE KANE: Ms. Lassiter, are there questions you might want to address to Mr. Caito?
>
> BY MS. LASSITER [for complainant]:
>
> Q. One particular question. With regard to the oral agreements which you personally negotiated either before or after receipt of the produce, did you ever reduce those of your understanding with regard to those oral agreements in writing and send a letter to the shippers reflecting that?

A. In several cases, we had asked the shippers if they would sen writing. One or two of them did. Others said, 'We will go along with oral agreement, but we would prefer to not put it in writing.' Some w reluctant to put it in writing, but felt satisfied with the agreement that had made.

You have to bear in mind we have been dealing with so many of th shippers for a good part of 15 years. And that for 12 of those 15 ye we enjoyed a rating, an AB rating, or a substantial rating with the 3X t many shippers didn't really have to know much more. I mean, they w satisfied. Many of them would say who would have ever dreamed that would be having problems with the collection, as we didn't, either.

I disagree with the view of respondent's attorney that the shippers reluctant to enter into written agreements for lengthy deferred paym because they did not want to concede they were not selling top qu produce. I infer that they were reluctant to enter into written agreements deferred payment (exceeding 30 days) because that would have vitiated t protection under the statutory trust provisions enacted in 1984. The statut trust provisions were a *cause celebre* in the produce industry. T requirement for written credit agreements, promulgated in connection with statutory trust provisions, and the loss of the trust benefits in the case written agreements for deferred payment exceeding 30 days, were wid discussed in the produce industry, through trade publications and indus organizations. That is undoubtedly why respondent was not able to obt written credit agreements for payment terms extending up to a year.

The ALJ relies on the oral agreements obtained by respondent's owne and their *attempts* to obtain (some) written agreements for deferred paymen as demonstrations of lack of willfulness. Contrariwise, I do not see the actions as diminishing respondent's willfulness, even to the slightest degre The Act and regulations expressly require *written* agreements for deferre payment. Obtaining an *oral* agreement is not an attempt to comply with th regulation. And deliberately failing to pay for produce within the regulator time limit for transactions in which there is no written agreement, after havin failed in an attempt to obtain a written agreement, is notorious disregard o the regulatory requirements.

For the foregoing reasons, the following Order should be issued.

Order

The license of respondent, The Caito Produce Company, is hereby revoked. This Order shall take effect on the 30th day after service of this order on respondent.

APPENDIX A

Excerpt from *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 424-32, 435-62 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).

APPENDIX B

Excerpt from *In re Rodman*, 47 Agric. Dec. ___, slip op. at 4-20 (Sept. 22, 1988) (order denying reconsideration).

APPENDIX C

Administrative Law Judge Paul Kane's Initial Decision and Order

This decision is promulgated pursuant to the Administrative Procedure Act, as amended, 5 U.S.C.A. §§ 554, 557 (1977 and Supp. 1988) and the Rules of Practice of the Department of Agriculture Governing Formal Adjudicatory Administrative Proceedings, 7 C.F.R. §§ 1.130-.151 (1988). This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, as amended, 7 U.S.C.A. §§ 499a-499s (1980 and Supp. 1988), hereinafter referred to as the Act or PACA, instituted by complaint filed on December 7, 1987, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that the respondent, in connection with its operations as a license holder subject to the Act, willfully, flagrantly, and repeatedly violated Section 2(4) of the Act (7 U.S.C.A. § 499b(4)(1980 and Supp. 1988)), in that it purchased, received and accepted 44 lots of fruits and vegetables, being perishable agricultural commodities, in interstate commerce, and did not make full payment promptly of the agreed purchase prices, or the outstanding balances, to 24 sellers, totaling $124,197.09, during the period of August 1986 through February 1987.[1]

Respondent filed an answer to the complaint on January 22, 1988, in which it admits the complaint's jurisdictional allegations and denies the specific alleged violations, i.e., that full payment had not been promptly made to the 24 identified sellers and denies the general allegations of statutory violations. Respondent's answer avers that all 24 sellers had been paid in full for the purchases identified in the complaint, which is taken to mean that such sellers had been fully paid on or before January 22, 1988. The answer also avers that agreements existed between the respondent and each of the 24 sellers identified in the complaint by which payments would become due on dates other than those expressed in the complaint, which is taken to mean that respondent avers agreements existed between respondent and its suppliers by which respondent was granted extended payment dates for its produce purchases.

An oral hearing was held on April 28, 1988, in Columbus, Ohio, before the undersigned. Leroy W. Gudgeon, Northfield, Illinois, appeared on behalf of the respondent. Sharlene W. Lassiter, Office of the General Counsel, United States Department of Agriculture, appeared on behalf of the complainant.

Allegations of Violation

The respondent is alleged to have violated the Act[2] as follows:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce--

---

[1]The complaint states in this regard: "during the period August 1986 through February 1986 . . ." This obvious typographical error was corrected during the hearing and proof was adduced to establish that the alleged violations occurred between August 1986 and February 1987.

[2]7 U.S.C.A. § 499b(4)(1980 and Supp. 1988).

(4) For any commission merchant, dealer, or broker t
fraudulent purpose, any false or misleading statement in c
any transaction involving any perishable agricultural comm
received in interstate or foreign commerce by such commis
or bought or sold, or contracted to be bought, sold, or con
commerce by such dealer, or the purchase or sale of
commerce is negotiated by such broker; or to fail or ref
correctly to account and make full payment promptly in
transaction in any such commodity to the person with
transaction is had; or to fail, without reasonable cause, to
specification or duty, express or implied, arising out of any
connection with any such transaction; or to fail to maintain
required under section 499e(c) of this title;

The complaint does not advance any allegation that the
have violated the so-called statutory trust provisions of the PA
§ 499e(c)(1)-(4), nor is it alleged that the respondent violat
Department's regulations. However, the regulations in this
follows:[3]

* * * * * *

(aa) "Full payment promptly" is the term used in the Act
the period of time for making payment without committing a
the Act. "Full payment promptly," for the purpose of
violations of the Act, means:

* * * * * *

(5) Payment for produce purchased by a buyer, within 10 da
day on which the produce is accepted;

(6) Payment to growers, growers' agents, or shippers by term
agents or brokers, who are selling for the account of a grower
agent, or shipper and are authorized to collect from the buyer o
within 5 days after the agent or broker receives payment from
or receiver;

* * * * * *

(11) Parties who elect to use different times of payment than
forth in paragraphs (aa) (1) through (10) of this section must re
agreement to writing before entering into the transaction and
copy of the agreement in their records. If they have so agre
within the agreed upon time shall constitute "full
Provided, That the party claiming the existence of
for time of payment shall have the burden of provi

* * * * * *

The complaint proclaims that the respondent's violations were so egregious as to require the revocation of the license which respondent must maintain in order to continue in business. The imposition of this sanction was pursued by complaint counsel at the hearing and in briefs which have been filed thereafter. This harsh penalty is authorized by the statute which provides that:[4]

* * * * * *

(a) Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499h of this title, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(h) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender;

The Administrative Procedure Act provides in pertinent part for the imposition of sanctions as follows:[5]

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given -

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

The respondent, through counsel, has vigorously argued that respondent's license should not be revoked, contending that this is but a "slow-pay" case, not worthy of the license revocation which could be warranted in a "no-pay"

---

[4] 7 U.S.C.A. § 499h(a)(1980 and Supp. 1988).

[5] 5 U.S.C.A. § 558(a)-(c)(1977).

case. Complaint counsel has conceded that each of the vendors identified in the complaint were indeed paid for the produce sold by them to the respondent, but argued that such payments were completed four to twelve months late. Complaint counsel further argued that the owners and officers of respondent were aware of the statutory obligations to pay promptly and that the failure to respond to this obligation displayed a series of willful, flagrant and repeated violations thereby justifying license revocation.

The evidence in this case clearly revealed repeated violations of the prompt payment requirements of the statute, thereby warranting the imposition of sanctions. However, those sanctions will be mollified by the fact that the record does not display evidence of any written or oral communication from the Department, by which the respondent's officers could have been advised prior to the filing of the complaint, that agreements to defer payments must, by regulations interpreting the statute, be written instruments rather than merely oral expressions. In addition, there is no evidence that the respondent was given an opportunity to comply with the statutory requirements prior to the issuance of the complaint. The record does, however, clearly display oral agreements between officers of respondent and representatives of the vendors identified in the complaint by which agreements the respondent's officers believed they had been authorized to pay for purchases of produce on extended or deferred terms, thereby obtaining compliance with the statute. Since respondent's officers had entered into these oral agreements, it would be a contradiction to conclude that willfulness, as the term is used in the Administrative Procedure Act, had been manifested in the violation of the statute.

Therefore, based on the findings and conclusions herein, respondent is found to have violated the Act. A sanction less severe than revocation of respondent's license shall be ordered, as evidence which would warrant license revocation pursuant to the requirements of the Administrative Procedure Act[6] is not found in this record.

Findings of Fact

1. The Caito Produce Company, hereinafter referred to as the respondent, is a corporation organized and existing under the laws of the State of Ohio. (Complaint, answer; CX 1)[7] Its business mailing address is P.O. Box 6836, 571 Holtzman Ave., Columbus, Ohio 43205. (Complaint; Answer; CX 1)

2. Respondent holds a license, number 701383, issued initially on April 6, 1970, pursuant to Section 4 of the Act (7 U.S.C. § 499d). This license is renewed annually and is next subject to renewal on or before April 6, 1989. (Complaint; Answer; CX 1)

3. Michael Caito and Samuel Caito are co-owners of the respondent corporation. (CX 1; TR 94) The respondent is solely managed, directed and controlled by these owners. (TR 15, 66, 71, 94-95)

4. During August 1986 through February 1987, respondent purchased, received and accepted 44 lots of fruits and vegetables, being perishable agricultural commodities, from 24 sellers, and failed to make full payment

---

[6] *supra*, note 5.

[7] "CX" followed by a numeral refers to those numbered exhibits offered by complaint counsel. "RX" followed by a numeral refers to those numbered exhibits offered by respondent's counsel. "TR" refers to the numbered pages of the transcript of the hearing held on April 28, 1988.

promptly of the agreed purchase prices, or outstanding balances due, in the total amount of $124,197.09. (Complaint; Answer; CX 2; TR 2, 10)

5. The record in this matter does not reveal the existence of substantial legitimate disputes concerning these produce transactions because respondent and its suppliers had understandings concerning the quality of produce shipped and received. (TR 68-69, 78, 97-98, 105, 108-109)

6. Respondent, as a matter of course, did not enter into written agreements with the 24 sellers described in finding 4 to extend the payment terms beyond invoice terms. (TR 26, 66, 75, 89, 98, 100, 102, 104)

7. Respondent, as a matter of course, did enter into oral agreements with the 24 sellers described in finding 4 to extend the payment terms beyond the invoice dates, and made full payment of the transactions described in finding 4 prior to the date of hearing. (RX 1-1 through 44-1; TR 26, 66, 68-69, 75, 77)

8. The evidence indicates that each of the agreements for the deferred payments by respondent were reached contemporaneously with the purchase, delivery or acceptance of the fruits or vegetables. (TR 66, 75)

9. On April 25 and 26, 1988, the Department's investigators re-visited respondent's place of business (TR 34) and upon an inspection of respondent's books and records, revealed that the respondent had failed to make full payment promptly for 65 lots of fruits and vegetables received and accepted during the period of March 1987 through March 1988, from 21 sellers in the total amount of $181,668.67. (CX 3,4) The record indicates that oral agreements existed for the deferred payment of all these purchases, (TR 26) and that such agreements with but two of these sellers had not been reduced to written form. (TR 104, 105)

10. The record does not reveal any breach of any agreement between respondent and its suppliers for the deferred payment of produce purchases described in findings 4 and 10.

11. The record reveals that on or about March 30, 1987, (TR 15) one of the respondent's owners was advised by a Department investigator that it was important to obtain extended payment terms in writing. (TR 17) This advice did not convey the information that a failure to obtain agreements of this type, in writing, was considered by the Department to be a violation of PACA. The complaint in this matter, filed December 7, 1987, did not specifically advise the respondent's owners that the Department's regulations require that agreements for the deferred payment of produce purchases be in written form. The respondent's bookkeeper, as of the date of the hearing, did not know that the Department's Regulations require that agreements extending payment terms must be in writing. (TR 88-89) However, as of the date of the hearing, April 28, 1988, the respondent's owners knew that extensions of terms for the payment of produce are, according to Department of Agriculture regulations, to be evidenced by written agreements. (TR 79-80) Hence, there is no evidence in this record that the respondent's owners knew, at any time prior to April 28, 1988, that the Department's Regulations require that agreements of this type be in written form.

12. This record does not contain any evidence that the Department's investigators or attorneys ever advised the respondent or its owners, in writing, or by oral communication, that it would be considered a violation of the Act, as interpreted by the Department's regulation, to fail to obtain consents, as evidenced by written agreements, to pay for produce purchases on deferred terms. This record also does not contain any evidence that the Department's investigators or attorneys ever gave respondent an opportunity to comply with the Act by observing the Department's Regulations.

Existence of Violations

"The Perishable Agricultural Commodities Act is admittedly and intentionally a 'tough' law." S. Rep. No. 2507, 84th Cong., 2d Sess. (citing H. Rep. No. 1196, 84th Cong., 1st Sess.), reprinted in 1956, U.S. Code Cong. and Ad. News 3699, 3701. The Act has resulted in ". . . one of the nation's most successful regulatory programs." *Quinn v. Butz*, 510 F.2d 743, 746 (D.C. Cir. 1975). "It is an intentionally rigorous law whose primary purpose is to exercise control. . .". *Harry Klein Produce v. U.S. Dep't of Agriculture*, 831 F.2d 403, 405 (2nd Cir. 1987).

Under the Act a licensee is required to conduct his business in a manner that insures he pays his bills fully and promptly. If he fails to do so, he violates the Act. For this reason, alleged mitigating circumstances are irrelevant. *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 782 (D.C. Cir. 1983)

While respondent's counsel has confirmed that the respondent did not make payment within 10 days of the various purchase dates,[8] the argument is advanced that the slow-payments program which respondent was forced to adopt was but the manifestation of a method of business approved by the suppliers and not so grave as to warrant the revocation of respondent's license.

Hence, the presence of a violation is not contested (TR 11) and is found to exist upon the principal that: "The Act calls for payment - not excuses." *In re George Steinberg and Son*, 32 Agric. Dec. 236, 268 (1973), aff'd *sub nom George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (2nd Cir. 1974), cert den'd 419 U.S. 830, 42 L.Ed. 2d 55, 95 S.Ct. 53.

Among the excuses which have been rejected are fire and bankruptcy: *Zwick v. Freeman*, 373 F.2d 110, (2nd Cir. 1967) cert den'd 389 U.S. 835; 19 L.Ed. 2d 96, 88 S.Ct. 43; *In re Gilardi Truck and Transportation*, 43 Agric. Dec. 118, 129 (1984); *In re George Steinberg and Son, id*; *In re Edward M. Hall*, 12 Agric. Dec. 725 (1953) and *In re James C. Cecil*, 7 Agric. Dec. 1105 (1948). Even the accomplishment of accord and satisfaction does not necessarily vitiate the violation. *In re M&H Produce Co.*, 34 Agric. Dec. 703 (1975), *aff'd, sub nom M&H Produce Co., Inc. v. Knebel*, 549 F.2d 830 (D.C. Cir. Feb. 16, 1977), (memorandum) published at 36 Agric. Dec. 470, cert. den'd, *sub nom M&H Produce Co., Inc. v. Bergland*, 434 U.S. 920, 54 L.Ed.2d 276, 98 S.Ct. 394. The Department's Judicial Officer continues to ignore excuses for non-payment, *In re Moore Marketing International, Inc.*, PACA Docket 7088, September 8, 1988; *In re McQueen Brothers Produce Co., Inc.*, PACA Docket 6956, September 8, 1988.

This respondent, of small size, with but few employees, was incorporated by two brothers in November 1986 to continue the produce business which they had followed, as a license holder since 1970 (finding 2) and for a total of 23 years (TR 66, 95). It appears that mischief, and worse, befell these individuals (TR 63) with the ultimate result that an admirable credit rating degenerated (TR 104) forcing respondent to conduct activities in the manner which the Department alleges to be illegal. (TR 101) The respondent's business focuses on the sale of products which arrive at its stalls in Columbus, Ohio in less

[8] Argument and brief of Calto Produce Company, filed July 7, 1988.

than prime condition, as "rollers" (TR 108) in need of "rehabilitation." (TR 98) As such, it is entirely suitable to perceive a commerce inclined to substantial post-shipment and invoicing negotiation and prepares the stage for the oral agreements which the owners and officers of respondent believed were sufficient to evidence compliance with the Act. However, the Department now requires that agreements of this nature be written instruments[9] and, a failure to obtain such constitutes a violation of the Act, for prompt payment was not made in accordance with the rules which were published for the benefit of the industry. These regulations[10] which, according to the Department, are to be given great weight in the interpretation of statutes enforced by the Department, *Farrow v. U.S. Dep't of Agriculture*, 760 F.2d 211, 213 (8th Cir. 1985), explicitly state that the parties to a transaction must reduce their agreement to writing if deferred payment terms are to be given and received in the sale and purchase of produce. The Regulations further provide:

> That the party claiming the existence of such an agreement for the time of payment shall have the burden of providing it.

Here, the respondent has not displayed any written instrument relating to the deferred payment terms for the purchase of produce, and hence, has not sustained the burden of proof that payments were promptly made as required by the statute.

Sanction

The Act provides that the Secretary may impose sanctions[11] upon licensees found flagrantly or repeatedly[12] to have violated the Act. As these penalty provisions are in the disjunctive, it is neeessary for the acts found repugnant to be either flagrant or repeated in order to establish a violation. *Wayne Cusimano, Inc. v Block*, 692 F.2d 1025, 1029 (5th Cir. 1982). "Flagrant" violations have been found to exist upon a fact which revealed that a licensee continued the purchase of perishable commodities even after officers of the licensee had probable knowledge that a precarious financial position would preclude prompt payment to its suppliers. *Zwick v. Freeman*, 373 F.2d 110, 115 (2nd Cir. 1967). "Repeated" violations also were found to exist in *Quinn v. Butz*, 510 F.2d 743, 751 (D.C. Cir. 1975) upon findings that the licensee had defaulted in prompt payments to 19 shippers on 47 transactions aggregating more than $100,000 over an eight-month period. Further, the statute was

---

[9]Prior to August 1972, the Department had determined that oral agreements for the deferred payment of produce could be legal, 37 F.R. 14561. *American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1557-1561 (1971); *In re Gilardi Truck and Transportation, Inc.*, 43 Agric. Dec. 118, 122n3 (1984).

[10]*supra*, note 3.

[11]*supra*, note 4.

[12]The relationship of facts to allegedly "flagrant or repeated" violations continues to be argued in *Veg-Mix, Inc.*, PACA 2-6612, remand order filed September 22, 1988, *Veg-Mix, Inc. v. USDA*, 832 F.2d 601 (D.C. Cir. 1987).

found to have been repeatedly violated upon the numerous purchase of perishable products during a relatively brief period of time, *Zwick, id.*

In this case, the respondent's failure to promptly pay $124,199.09 to 24 sellers upon 44 transactions consummated over a six-month period, as alleged in the complaint, a fact established at finding 4, thus displayed "repeated" violations of the Act and such failure, hence, justifies the imposition of penalties, notwithstanding the existence of oral agreements by which the suppliers agreed to accept deferred payments. The Regulations which interpret this statute require that agreements for deferred payments, if they exist, be in writing. Counsel has not cited any case which suggests that evidence of parol contracts satisfies the requirements of the regulation in this regard.

Respondent's counsel does argue, with citations to a whimsical stage-play, that respondent's failure to abide by the statute does not warrant the revocation of respondent's license. Complaint counsel argue to the contrary, with citations to a host of precedent, that revocation is the proper sanction.[13]

However, in order to obtain that result, the Administrative Procedure Act[14] requires that the licensee be given the so-called "second chance." This statute requires that the agency granting the license give written notice to the licensee of the existence of offending conduct, so as to permit the licensee an opportunity to obtain compliance, prior to the institution of proceedings by which such license could be ordered revoked. In this case, the Department did not adhere to the requirements of the Administrative Procedure Act for the Department did not provide to respondent, its officers or owners, written notice of any possible violation of the PACA or the interpreting regulations. The testimony of the Department's investigator was that upon the completion of the March 1987 audit, which audit revealed the alleged violation of the statute, the investigator orally advised an officer of respondent that it was only important that agreements for the extension of terms for the payment of produce be in written form. (Finding 11) This oral expression was insufficient as it did not advise the respondent of a possible violation of the PACA. The transcript of the hearing on this point (TR 17-18) suggests that complaint counsel is of the opinion that the so-called "ten day pay rule" is expressed in the PACA. It is not. It is a Department regulation, see 7 C.F.R. § 46.2(aa)(5)(1987). Further, the Department's purported warning was not in writing as expressly mandated by the Administrative Procedure Act. Logic compels the Department to consistently apply the same standards as it would have the industry follow. If the produce merchants must display written agreements describing deferred payments, the Department must display written pre-complaint advice to particular industry members that violations may exist. The Department should be aware that support exists for brief "second chance" periods of time. In *Holt Hauling and Warehousing System, Inc. v. U.S.* 650 F. Supp. 1013, 1018 (C.I.T. 1986), a twelve-day period was considered non-prejudicially sufficient for the licensee to demonstrate compliance.

However, the language of the Administrative Procedure Act specifies that agencies need not provide licensees written notice of a violation and the

---

[13]The Department has recently accepted a sanction less severe than revocation in a case involving agricultural produce purchases by a respondent seeking bankruptcy protection. *In re Moore Marketing International, Inc.*, PACA 2-7088, September 8, 1988.

[14]*supra*, note 5.

opportunity for correction, if the licensee's violation is considered willful, or adverse to the public health, interest or safety. In this case, there is no contention advanced by complainant's counsel that the respondent's actions in any way could be considered as being adverse to the public health, interest, or safety.

Complainant's counsel only contends that respondent's activity, or indeed inactivity, constituted a willful violation of the PACA, thereby excusing the Department from the mandate of the Administrative Procedure Act that written notice of a perceived violation be delivered to the licensee.[15]

The relationship of the term "willful" as applied to the PACA has been the subject of previous definition:

> Under [the Perishable Agricultural Commodities Act], an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980). See also *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830, 95 S.Ct. 53, 42 L.Ed.2d 55 (1974).[16]

This definition has been followed more recently in *Holt Hauling & Warehousing System, Inc. v. U.S. Customs Service*, 650 F.Supp. 1013, 1016 (C.I.T. 1986)[17], which presented the following discourse in regard to the Administrative Procedure Act at 5 U.S.C. § 558(c):

> Congress recognized that licensees "are subjected to irreparable injuries unless safeguards are provided. The purpose of this section is to remove the threat of disastrous, arbitrary, and irremediable administrative action." *Administrative Procedure Act: Legislative History*, S.Doc. No. 248, 79th Cong., 2d Sess. 368 (1946).[3] The legislative history further indicates that this "section is designed to preclude the withdrawal of licenses, except in cases of willfulness or the stated cases of urgency, without affording the licensee an opportunity for the correction of conduct questioned by the agency." S.Doc. No. 248, *supra* at 35. The demonstrable facts must fully and fairly warrant application of the exceptions. "Willfulness must be manifest." *Administrative Procedure Act*, S.Rep. No. 752, 79th Cong., 1st Sess. 25-26 (1945) *reprinted in Administrative Procedure Act: Legislative History*, S.Doc. No. 248, *supra*, at 211-212.

---

[15]Respondent's counsel chose to not brief the "willfulness" issue before the Administrative Law Judge.

[16]As cited in *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1983). *See also In re McQueen Brothers Produce Co., Inc.*, PACA 2-6956, slip op. at 9 (September 8, 1988); *In re Robert E. Parchman*, P&S 6602, slip op. at 8 (May 28, 1987); *In re Henry S. Shatkin*, 34 Agric. Dec. 296, 301-314, (1975), which in part expressed the policy of the Department's Judicial Officer to ignore the court's consideration of the term "willful" in *Economou v. U.S. Department of Agriculture*, 494 F.2d 519 (2nd Cir. 1974).

[17]The Department's Judicial Officer has previously looked to interpretations of the Administrative Procedure Act in the application of statutes enforced by other Federal departments and agencies. *See In re Gilardi Truck and Transportation, Inc.*, 43 Agric. Dec. 118, 152-3 (1984).

The procedures in § 558(c) have been interpreted to afford a licensee a "second chance" to conform with regulatory mandates before more formal agency action, in the nature of suspension or revocation, is undertaken. *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1074 (7th Cir. 1982). *Blackwell College of Business v. Attorney General*, 454 F.2d 928, 933-934 (D.C. Cir. 1971). Absent a finding of willfulness, the licensee is entitled to written notice of the facts warranting suspension as well as an opportunity to remedy those transgressions before actual suspension. *Gallagher & Ascher Co. v. Simon*, 687 F.2d at 1074; *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997, 101 S.Ct. 1701, 68 L.Ed.2d 197 (1981).

Willfulness has been defined as the (1) intentional performance of an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or (2) action which carelessly disregards statutory requirements. *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Koden v. United States*, 564 F.2d 228, 234 (7th Cir. 1977). The agency's burden was to show petitioner's "actions were intentional as opposed to accidental." *Lawrence v. Commodity Futures Trading Commission*, 759 F.2d 767, 773 (9th Cir. 1985).

---

[3]This refers to § 9(b) of the A.P.A. of 1946, the predecessor section to 558(c), almost identical in language, as to the pertinent parts.

The Court in *Holt, id*, selected the definition of willfulness enunciated i *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961), which was:

We hold the petitioner's conduct was willful within the meaning of Section 9(b) of the Administrative Procedure Act. We think it clear that if a person 1) intentionally does an act which is prohibited, -irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements, the violation is willful.

The *Goodman* definition was not followed in *Capitol Packing Company v United States*, 350 F.2d 67 (10th Cir. 1965). In *Capitol Packing*, the appellee which was the United States Department of Agriculture, sought th application of the *Goodman* definition of "willfulness." However, the Tenth Circuit, at 78, concluded that precedent supported

. . . the interpretation of 'wilfulness' contended for by appellants, that is, an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof. This interpretation receives support from the legislative history of the Administrative Procedure Act. As stated in the House Report on the Act, in discussing § 9(b):

The exceptions to the second sentence, regarding revocations, apply only when the demonstrable facts fully and fairly warrant their application. Willfulness must be manifest. H.R.Rep.No. 1980, 79th Cong., 2d Sess. 41 (1946).

See also, S.Rep.No.752, 79th Cong., 1st Sess. 25 (1945), 92 Cong.Rec. 5654 (remarks of Congressman Walter).

The Department's Judicial Officer has established a policy that the *Capitol Packing* definition of willfulness will not be followed in the Department's proceedings. This was most recently manifested *In re Robert E. Parchman*, P&S 6602, slip op. at 8, (May 28, 1987), in which the Judicial Officer issued a Decision and Order which, in part, found that Respondent Parchman had willfully violated the Packers and Stockyards Act, stating:

> Additionally, the Judicial Officer has ruled this interpretation [Capitol Packing] is negated by the Supreme Court's decision in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S., 182, 185, 187 (1973). See *In re J. A. Speight, supra*, at 303. Thus, the violations of May 18, 1985, were wilful.

In re J. A. Speight, et al., 33 Agric. Dec. 280 (1974), the Judicial Officer wrote, 302-303, in reference to the *Capitol Packing, id*, as follows:

> I do not find the support for the meaning of wilfulness in the legislative history that the Court found. For the legislative history to show that "[w]ilfulness must be manifest" does not help me in defining wilfulness. Once I know the definition of wilfulness, then I know from the legislative history that it must be manifest, but I find nothing in the legislative history to shed light on the definition of wilfulness.
>
> I believe that the many cases set forth above correctly interpret the Congressional intent as to wilfulness, as used in the Administrative Procedure Act. In view of the legislative history relied on by the Court in the *Capitol Packing Company* case, *supra*, a finding of wilfulness should be made if it is manifest from the record that a person has intentionally done an act which is prohibited - irrespective of evil motive or reliance on erroneous advice, or acted with careless disregard of statutory requirements.

The conflict in the Circuits was most recently addressed by the Court for the Sixth Circuit, the Circuit within which respondent, Caito Produce, conducts its business.

In *Parchman v. U.S. Dep't of Agriculture*, 852 F.2d 858 (6th Cir. 1988), the Court determined that the Administrative Procedure Act at 5 U.S.C.A. § 558(c) does indeed limit the Secretary's discretion in imposing sanctions upon those licensed under the Department's operative statutes. This Court cited, *Parchman* at 865, to the precedent of the definition of willfulness advanced by the Tenth Circuit in *Capitol Packing, id.*

The resolution of the "willfulness" issue in the Sixth Circuit was predictable,[18] but, it was an issue which need not have been pursued either by the Court or the Judicial Officer because respondent had been given written notice by the Department of the perceived violation prior to the issuance of the formal complaint. And, the point, that willfulness was not an issue, was emphasized by both the court, *Parchman, id*, 865 and by the Judicial Officer, *In re Robert E. Parchman*, P&S 6602, slip op. at 64 (May 28, 1987), because as noted in both opinions, the Department had complied with the Administrative Procedure Act, 5 U.S.C.A. § 558(c)(1), by providing prior written notice of the egregious conduct.

---

[18]The Court determined that the record did not support the Judicial Officer's conclusion that the violations were willful, *Parchman, id*, 865.

In this matter, complainant's counsel offered no citation to record evidence which could support the contention that respondent's behavior was willful.[19] Counsel argues[20] ". . . respondent knew of the statutory requirements of full payment promptly and acted in careless disregard for its obligations under the Act." Counsel's citation to Mr. Michael Caito's testimony (TR 65-68) establishes that the officers of respondent obtained verbal agreement for the deferred payment for purchases of produce. The testimony[21] was:

Q. Now you realized, of course, that the produce that you were receiving was not being paid within the ten-day period; is that right?

A. Yes, sir.

Q. What, if anything, did you do to contact the sellers regarding your payment to them, if you recall?

A. In regard to it, and we saw it coming. And between myself, my brother, Mary Baker Clark, we contacted everybody.

Q. All of these various creditors --

A. -- had been contacted personally.

Q. By phone or --

A. -- by phone; yes, sir.

Q. What happened at that time, if you recall?

A. At that time, the majority of them I done business with fur a period of 25 years and agreed immediately to a schedule that we set a certain amount of terms or a dollar figure and with the option that if I missed a week or two weeks, they would not be offended.

Counsel's citation to Mr. Samuel Caito's testimony (TR 97-98) leads, similarly to the conclusion that the respondent's suppliers had agreed to deferred payments. Mr. Samuel Caito testified (TR 97-99) as follows:

***So, they would call me knowing that I could handle it, or I could rejuvenate it, or I could distribute and see it got taken care of in as short a period of time as possible.

A lot of the times they knew that, in fact, by dealing with them that some of the accounts we sold to take longer than ten days or whatever it happens to be, 10 days or 21 days. In many other cases, some cases it's specified 21 days anyway on the bill of lading. But in a couple of cases,

---

[19]Complaint counsel chose not to file a reply brief, relying solely on the proposed findings id brief filed June 29, 1988.

[20]Brief filed June 29, 1988, p. 6.

[21]TR 66.

I said, "I can't, you know, I can't give you the returns you want in this period of time, but I would be willing to handle it for you provided you give me the ample time in order to make my account of sales."

And the account of sales on these types of loads is not necessarily an easy bookkeeping item. It takes a little bit of time in keeping track of each different commodity and grouping that you buy in tagging them to the particular loads that they come in on. So, there is cases where they knew that it was going to take us longer than the normal period of time.

Q. So, this would have been done right at the time that you were proceeding to handle or buy it from them?

A. Yes, sir. A lot of times, you really don't know until many days afterwards how much rejuvenation or rehabilitation of this product or how much it's going to take and what you can get out of it and customers can stand for a price to determine what a proper settlement would be to a shipper.

This testimony and the record in its entirety permit the conclusion and finding that the respondent did indeed violate the Act by its failure to obtain written agreements deferring the prompt payment for produce purchases. However, the testimony and entire record do not permit the conclusion that the respondent's failure to obtain such agreements in writing constituted willful violations. Indeed, the display by respondent's officers in their efforts to obtain agreements in writing is found in the following testimony: (TR 103-104)

Q. One particular question. With regard to the oral agreements which you personally negotiated either before or after receipt of the produce, did you ever reduce those of your understanding with regard to those oral agreements in writing and send a letter to the shippers reflecting that?

A. In several cases, we had asked the shippers if they would send in writing. One or two of them did. Others said, 'We will go along with this oral agreement, but we would prefer to not put it in writing.' Some were reluctant to put it in writing, but felt satisfied with the agreement that we had made.

This testimony supports the conclusion that respondent's failure to obtain written agreements by which it could defer payments for produce purchases violated the Act, which extends no leeway for non-compliance. The statute calls for a *per se* interpretation. However, the testimony cited above establishes that attempts to comply with the statute, by express oral agreements for the deferred purchase of produce are sufficient to conclude that respondent's officers did not display intent or careless disregard in accomplishing the violations. It is further determined that even if the post-complaint transactions, the so-called compliance evidence, described in finding 9 had been alleged in the complaint to be violations of PACA, and even if such were found to be violations, the evidence does not support the imposition of the Department's most severe sanction for, as with the transactions described in finding 4, the Department's evidence does not satisfy the requirements of the Administrative Procedure Act.

The Department's Judicial Officer has addressed the nature of allegedly oral contracts for the deferred payment for produce purchases. *In re Carpenito Bros., Inc.*, PACA 2-6846, slip op. (March 26, 1987), and *In re Gilardi Truck and Transportation, Inc.*, 43 Agric. Dec. 118 (1984). In both those cases, the allegedly oral agreements were considered as but elements in determining the existence of violations of the PACA. In this matter, the oral agreements are considered not as manifestations of statutory non-compliance, but rather as displays of failed attempts to comply with the statute and regulations. Here, the respondent is found to have violated the Act; and hence, the issue is the effect of the proven agreements upon the scope of the sanction.

Complaint counsel relies (TR 50) upon the *Gilardi* and *Carpenito* cases. In *Gilardi*,[22] *id*, 121-122, the respondent entered into agreements to pay for produce on a deferred basis and subsequently failed to adhere to those agreements with the result that its license was revoked.[23] In *Carpenito*, the respondent received written notice from the Department that its oral agreements were not in compliance with the Department's views of the PACA prior to the filing of the complaint, *Carpenito, id*, slip op. at 3, with the result that a finding that respondent had "willfully" violated the PACA was superfluous. Further, the probative value of the alleged agreements to prove violations in *Carpenito* was significantly reduced by evidentiary issues and by the fact that the respondent also failed to adhere to its agreements to pay for produce on a deferred basis, *Carpenito, id*, slip op. at 17. It is also significant to note that the Judicial Officer's *Carpenito* decision did not address the Administrative Procedure Act nor the term "willful" as expressed in that Act. The license revocation ordered in *Carpenito, id*, was subsequently confirmed in *Carpenito Bros., Inc. v. U.S. Dep't of Agriculture*, No. 87-1190 (D.C. Cir. April 19, 1988) (per curiam) with the warning that:

> In their zeal to carry out their regulatory mission, agencies must not abandon their duty to ensure that the punishment fits the crime.

It is further noted that in *Carpenito, supra*, the respondent was found to have violated PACA at the same section as did respondent in this matter.[24] Nevertheless, the Judicial Officer utilized *Carpenito* to express a sanction policy upon violations of other sections of PACA, the statutory trust provisions.[25]

The cases upon which complainant's counsel relies, and other precedent, leads to the conclusion that the tenants of the Administrative Procedure Act have not been observed by the Department. The *Parchman* and *Capitol Packing* cases suggest a finding of "willfulness" if there has been an intentional misdeed or such gross neglect as to reveal an intent to perform that misdeed.

---

[22]The Judicial Officer's elucidation in *Gilardi, id*, 120, of the term "willful" cites only to *American Fruit Purveyors, Inc. v. U.S.*, 630 F.2d 370 (5th Cir. 1980).

[23]This is the result of the "square holding" in *Gilardi*. See *Carpenito, id*, slip op. at 28.

[24]*supra*, note 2.

[25]7 U.S.C.A. § 449e(c)(1)-(4)(1980 and Supp. 1988).

The *American Fruit*, *Holt*, *Goodman* and *Speight* cases[26] permit a disjunctive finding of "willfulness" should intent be amorphous, if the respondent's misdeed were committed in careless disregard of the statute.

It is clear that the Department's counsel has not sustained the burden of proof, as required by *Lawrence v. Commodity Futures Trading Commission*, 759 F.2d 767 (9th Cir. 1985) that respondent intended to violate the statute. Nor, did counsel sustain the burden of proof in the disjunctive, that respondent's actions as performed by its corporate officers manifested a careless disregard of the Perishable Agriculture Commodities Act.

"Willfulness" has not been proven in this case. Officers of respondent displayed attempts to obtain the written agreements (TR 104), which the Department charges are necessary to legally defer payments for produce purchases. These officers contacted their suppliers and asked for written confirmation of their agreements. Hence, they intentionally attempted by acts of commission to obtain the proof which the Department contends by acts of omission to be a display of "willfulness." If the Department wished to avoid the expense of delivering a written notice to the respondent advising the respondent that a violation was perceived, it should have been prepared to prove the intent of officers of respondent, as required by both *Capitol Packing, id*, and *Goodman, id*, cases, or in the alternative, the Department should have advanced proof that officers of respondent acted in careless disregard of the statutory requirements, as suggested by the *Goodman, id*, line of cases. However, counsel supporting the complaint have not sustained the burden of proof in this regard.

Therefore, since the record fails to disclose that the Department provided written notice of perceived violations, and since the record does not disclose willfulness as an alternative element, the Administrative Procedure Act, 5 U.S.C.A. § 558(a)-(c) precludes the revocation of respondent's license as a result of this proceeding.

This does not mean that respondent will not be punished for the violations of PACA. But, such punishment will be assessed in relationship to the fact that the record establishes than an officer of respondent did not display knowledge that agreements to extend payment for produce purchases must be in writing until the day of the hearing. (Finding 11) The record also establishes that the respondent's business was conducted with its suppliers of long-standing and that its method of paying for purchases had been submitted to those suppliers and that the suppliers have been paid. Nevertheless, the statute has been violated. Accordingly, and with the guidance of *In re Carpenito Bros., Inc., PACA 2-6846, slip op. (March 26, 1987), aff'd. Carpenito Bros., Inc. v. U.S. Dep't of Agriculture*, No. 87-1190 (D.C. Cir. April 19, 1988) (per curiam); *In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557, 1572-73 (1981), aff'd sub nom *Magic Valley Potato Shippers, Inc. v. Secretary*, 702 F.2d 840 (9th Cir. 1983) (per curiam); and In re *American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372 (1979), aff'd *American Fruit Purveyors, Inc. v. U.S.*, 630 F.2d 370 (5th Cir. 1980) (per curiam), the following conclusion is reached.

---

[26] The mandates of *Holt*, *American Fruit*, *Goodman* and *Speight* cases must be applied by the Administrative Law Judge in this matter. *Mattes v. U.S.*, 721 F.2d 1125, 1129 (7th Cir. 1983), *In re Samuel Esposito* 38 Agric. Dec. 613, 663-65 (1979).

Conclusion

The complaint in this matter alleged, and the record as a whole permits the conclusion, that respondent repeatedly violated Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C.A. § 499b(4)) during August 1986 through February 1987.

Accordingly, based on the attached findings of fact and conclusion, the following Order is entered.

Order

The respondent is suspended as a licensee under the Perishable Agricultural Act for a period of (30) thirty days, provided, however, that such suspension shall not become effective during those times that the respondent is in full compliance with the Act, including those provisions requiring payment within (10) ten days, or having written express agreements as to payment.

This Order shall take effect on the (11) eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice and Procedure, this decision will become final without further procedure (35) thirty-five days after service hereof unless appealed to the Judicial Officer, by a party to the proceeding, within (30) thirty days, after service as provided by the Rules of Practice at 7 C.F.R. § 1.145 (1988).

Copies hereof shall be served upon respondent and counsel.

APPENDIX D

Excerpt from *In re Shatkin*, 34 Agric. Dec. 296, 297-314 (1975).

In re: JOHNNY E. FAIR, d/b/a MRS. FAIR'S FINER FOODS.
PACA Docket No. D-88-518.
Decision and Order filed June 9, 1989.

Failure to make full prompt payment - Purpose of Act.

Ben E. Bruner, for Complainant.
John C. MacConnell, for Respondent.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; the "Act"), and the Act's regulations at 7 C.F.R. §§ 46.1 through 46.45. The Complaint in this proceeding, filed on March 1, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, alleged that respondent violated Section 2 of the Act (7 U.S.C. § 499b) by failing to make full payment promptly of the agreed purchase prices for 57 lots of perishable agricultural commodities, in the total amount of $138,280.48. Respondent's March 23, 1988, Answer denied that he violated the Act.

In a March 27, 1989, telephone conference with complainant's attorney, Ben E. Bruner, Esq., and respondent's attorney, John C. MacConnell, Esq., both stated that an oral hearing would not be necessary. They agreed to file a stipulation of facts by April 27, 1989, and to file simultaneous proposed findings, proposed conclusions and briefs within 30 days of filing the stipulation. They filed the stipulation on April 27, 1989. Complainant filed its proposed findings of fact, proposed conclusions of law and brief on May 26, 1989. Respondent filed a post-hearing brief on May 31, 1989. All proposed findings, proposed conclusions and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

Findings of Fact

The parties stipulated and I find:

1. The following tabulation accurately and truly reflects the respondent's purchases during 1986 and 1987:

Trans. No.	I Seller and Address	II Quantity and Commodity	III Date Accepted by Respond.	IV Date Payment Due to Seller	V Agreed Purchase Price	
1.	Veg-A-Mix Castroville, CA	245 ctns. mxd. veg.	10-12-86	11-02-86	$1,660.00	(PAID)
2.	"	352 ctns. mxd. veg.	10-18-86	11-08-86	2,008.75	(PAID)
3.	Veg-A-Mix Castroville	145 ctns. mxd. veg.	10-25-86	11-15-86	1,231.00	(PAID)
4.	"	215 ctns. mxd. veg.	11-09-86	11-30-86	1,343.25	(PAID)
5.	"	228 ctns. peppers	11-12-86	12-03-86	1,276.80	(PAID)
6.	"	315 ctns. mxd. veg.	11-15-86	12-06-86	2,119.00	
7.	"	45 ctns. mxd. veg.	12-08-86	12-29-86	274.25	(PAID)
8.	"	30 ctns. mxd. veg.	12-16-87	01-06-86	174.50	(PAID)
9.	"	93 ctns. mxd. veg.	12-24-86	01-14-87	663.45	
10.	"	70 ctns. mxd. veg.	01-18-87	02-28-87	650.50	
11.	"	105 ctns. mxd. veg.	02-10-87	03-03-87	808.25	(PAID)
				TOTAL	$12,209.75	

Trans. No.	I Seller and Address	II Quantity and Commodity	III Date Accepted by Respond.	IV Date Payment Due to Seller	V Agreed Purchase Price	
12.	Gary H. Hatfield Ltd. Hartland, N.B., Canada	475 pkgs. potatoes	10-22-86	11-01-86 TOTAL	$3,143.75 $3,143.75	(PAID)
13.	Vasto Valle Farms Huron, CA	300 ctns. lettuce	11-05-86	11-20-86	1,200.00	(PAID)
14.	"	275 ctns. lettuce	11-11-86	11-26-86	2,475.00	(PAID)
15.	"	225 ctns. lettuce	11-15-86	11-30-86 TOTAL:	2,475.00 $6,150.00	
16.	Robinson Farms Blythe, CA	250 ctns. lettuce	12-09-86	12-19-86	$1,770.05	
17.	"	200 ctns. lettuce	12-13-86	12-23-86	1,364.00	
18.	"	250 ctns. lettuce	12-16-86	12-26-86 TOTAL:	1,571.78 $4,705.83	
19.	De Bruyn Produce Co. Zeeland, MI	500 pkgs. potatoes	12-07-86	12-28-86 TOTAL:	$5,012.50 $5,012.50	(PAID)
20.	Colorado Potato Growers Exch. Denver, Co.	500 pkgs. onions	12-16-86	12-26-86 TOTAL:	$4,250.00 $4,250.00	(PAID)
21.	Anthony Brokerage, Inc. Phoenix, AZ	180 ctns. citrus	12-25-86	01-14-87 TOTAL:	$1,147.50	(PAID)
22.	"	30 ctns. lemons	01-07-87	01-27-87	285.00	(PAID)
23.	"	125 ctns. citrus	01-18-87	02-07-87	892.50	(PAID)
24.	"	82 ctns. citrus	02-16-87	03-08-87 TOTAL:	637.00 $2,962.00	(PAID)
25.	California Produce Distributors Los Angeles, CA	375 ctns. mxd. veg.	01-12-87	02-02-87	$3,373.00	(PAID)
26.	"	60 ctns. avocados	02-09-87	03-02-87 TOTAL:	582.00 $3,955.00	(PAID)
27.	David Dodd Sales Pinky River, VA	233 ctns. apples	01-16-87	01-26-87 TOTAL:	$2,528.05 $2,528.05	(PAID)

Trans. No.	I Seller and Address	II Quantity and Commodity	III Date Accepted by Respond.	IV Date Payment Due to Seller	V Agreed Purchase Price	
28.	Rancho Sales Co. El Centro, CA	200 ctns. lettuce	01-18-87	01-28-87	$1,380.00	(PAID)
29.	Rancho Sales Co. El Centro, CA	280 ctns. lettuce	02-08-87	02-18-87 TOTAL:	$1,232.00 $2,612.00	(PAID)
30.	H.J. Savage & Sons Grand Falls, NB	900 pkgs. potatoes	01-18-87	01-28-87	$4,612.50	
31.	"	880 pkgs. potatoes	01-21-87	01-31-87 TOTAL:	4,510.00 $9,122.50	
32.	Iverson Brokerage Co. Forest Park, GA	870 ctns. onions	01-18-87	01-28-87 TOTAL:	$11,527.50 $11,527.50	(PAID)
33.	Oxnard Veg. Exchange, Inc. Oxnard, CA	65 ctns. mxd. veg.	01-31-87	02-10-87	659.75	(PAID)
34.	"	118 ctns. mxd. veg.	03-04-87	03-14-87	940.20	(PAID)
35.	"	85 ctns. mxd. veg.	03-10-87	03-20-87 TOTAL:	739.00 $2,338.95	(PAID)
36.	Ralph Culberson & Sons Ltd. Woodstock, NB	125 ctns. potatoes	02-09-87	03-02-87	$ 831.25	(PAID)
37.	"	500 ctns. potatoes	02-15-87	03-08-87 TOTAL:	3,850.00 $4,681.25	(PAID)
38.	Fisher Ranch Corporation Blythe, CA	200 ctns. lettuce	03-05-87	03-26-87	$1,200.00	(PAID)
39.	"	42 ctns. broccoli	03-08-87	03-29-87	277.20	(PAID)
40.	"	250 ctns. lettuce	03-15-87	04-05-87 TOTAL:	2,000.00 $3,477.20	(PAID)
41.	Ball Brothers Produce Lewisville, ID	265 ctns. potatoes	03-09-87	03-24-87 TOTAL:	$2,083.75 $2,083.75	(PAID)
42.	Fresh Co., Inc. Salinas, CA	581 ctns. mxd. frt.	03-16-87	03-26-87	$4,241.70	(PAID)
43.	Fresh Co.,Inc.	433 ctns. mxd. frt. & veg.	03-18-87	03-28-87	2,868.00	

Trans. No.	I Seller and Address	II Quantity and Commodity	III Date Accepted by Respond.	IV Date Payment Due to Seller	V Agreed Purchase Price
44.	"	708 ctns. mxd. frt. & veg.	03-22-87	04-01-87	4,703.55
45.	"	925 ctns. mxd. frt. & veg.	03-26-87	04-05-87	7,712.00
46.	"	879 ctns. mxd. frt. & veg.	03-29-87	04-08-87	6,327.75 (PAID)
47.	"	741 ctns. mxd. frt. & veg.	03-31-87	04-10-87	4,692.90 (PAID)
48.	"	397 ctns. mxd. frt. & veg.	04-08-87	04-18-87	2,696.25 (PAID)
49.	"	759 ctns. mxd. frt. & veg.	4-11-87	04-21-87	4,273.25 (PAID)
50.	"	975 ctns. mxd. frt. & veg.	04-12-87	04-22-87	6,311.50 (PAID)
51.	"	204 ctns. mxd. frt. & veg.	04-15-87	04-25-87	1,172.10 (PAID)
52.	Fresh Co.,Inc.	782 ctns. mxd. frt. & veg.	04-19-87	04-29-87	4,622.95 (PAID)
53.	"	693 ctns. mxd. frt. & veg.	04-22-87	05-02-87	3,573.50 (PAID)
54.	"	80 ctns. mxd. frt. & veg.	04-26-87	05-06-87 TOTAL:	320.00 (PAID) $53,515.45
55.	James H. Paxson's & Sons, Inc. West Grove, PA	146 ctns. mxd. frt. veg.	04-07-87	04-17-87	$1,625.00 (PAID)
56.	James H. Paxson's & Son's, Inc. West Grove, PA	62 ctns. mxd. frt. & veg.	05-05-87	05-15-87	764.00 (PAID)
57.	"	134 ctns. mxd. frt. & veg.	05-12-87	05-22-87 TOTAL:	1,616.00 (PAID) $4,005.00
		of all actions			$138,280.48

2. Each of these 57 transactions was in "interstate commerce," as that term is defined at 7 U.S.C. § 499a (3) and (8).

3. Each of the commodities described in column II of the tabulation in paragraph 1 is a "perishable agricultural commodity" as that term is defined at 7 U.S.C. § 499a(4).

4. In the 57 transactions set forth in paragraph 1, respondent "accepted," as that term is defined at 7 C.F.R. § 46.2 (dd) the referenced perishable agricultural commodities on the dates set forth in column III of the tabulation. Respondent failed to pay the agreed purchase price (column V) by the date payment was due to the seller (column IV).

5. As of April 3, 1989, respondent still owed $138,280.48 for the 57 transactions set forth in paragraph 1 above.

I also find:

1. Respondent's business mailing address is P.O. Box 151, Deland, Florida 32720. (Answer #2)

2. Pursuant to the licensing provisions of the Act, License Number 761130 was issued to respondent on February 18, 1976.

CONCLUSIONS OF LAW

The Act was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. § 2163 (May 29, 1929). Shippers of fresh fruits and vegetables had been suffering severe losses due to unfair practices on the part of commission merchants, dealers and brokers. H.R. Rep. 1041, 71st Cong., 2d Sess. (1930). The Act's primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *Chidsey v. Guerin,* 443 F.2d 584 (6th Cir. 1971); *O'Day v. George Arakelian Farms, Inc.,* 536 F.2d 856 (9th Cir. 1976). "Accordingly, certain conduct by commission merchants, dealers, or brokers [was] declared to be unlawful. 7 U.S.C. § 499b." Id at 858. Enforcement is effectuated through a system of licensing with penalties for violations. H. Rep. 1041, 71st Cong., 2d Sess. (1930). *See, also, George Steinberg and Son., Inc. v. Butz,* 491 F.2d 988 (2d Cir. 1974). *cert. denied.* 419 U.S. 830 (1974). In enacting the Act, Congress intended to establish bars to preclude all but financially responsible persons from engaging in the businesses subject to the Act. *Zwick v. Freeman,* 373 F.2d 110, 117 (2d Cir. 1967), *cert denied,* 389 U.S. 835 (1967); *Marvin Tragash Co. v. United States Department of Agriculture,* 524 F.2d 1255, 1257 (5th Cir. 1975).

Respondent's failures to make timely payment violate section 2 of the Act (7 U.S.C. § 499b). *Atlantic Produce Co.,* 35 Agric. Dec. 1631 (1976), *aff'd mem.,* 568 F.2d 772 (4th Cir. 1978.), *cert denied,* 439 U.S. 819 (1978). Respondent's numerous violations constitute flagrant and repeated violations of the Act. These violations are willful. A violation is willful if, regardless of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or carelessly disregards the requirements of a statute. *Henry S. Shatkin,* 34 Agric. Dec. 296 (1975); *G. Steinberg & Son, supra,* 32 Agric. Dec. 236, 263-69 (1973); *Goodman v. Benson,* 286 F.2d 896 (7th Cir. 1961). Although Respondent has made payments to some of his sellers, he still owes over $19,000.00 to sellers for purchases dating back to 1986. Thus, Respondent has not demonstrated present compliance with the Act. The appropriate sanction for this conduct is the revocation of Respondent's license. Carpenito Bros., Inc., 46 Agric. Dec. 486 (1987).

Order

The license of Johnny Fair, d/b/a Mrs. Fair's Finer Foods is revoked.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after its service unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice.

[This Decision and Order became final July 19, 1989.-Editor]

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

MYCO ENTERPRISES v. BOISE FARMERS MARKET, INC.
PACA Docket No. 2-7238.
Decision and Order issued September 22, 1987.

Having received and accepted produce, respondent has burden to show seller breached contract - Where produce is held by purchaser for considerable time after shipment and acceptance, it must present evidence that produce is merchantable where latent defect is alleged.

Watermelons were embargoed and ordered destroyed by the State for alleged pesticide contamination, 19 days after receipt and acceptance by respondent. Respondent asked complainant for documentation of a growing field, but it was obtained after the fact.
Held for complainant, as no evidence to prove melons were merchantable at time of embargo.

Allan R. Kahan, Presiding Officer.
Thomas R. Oliveri, for Respondent.
Respondent, Pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

Preliminary Statement*

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $650.00, in connection with the sale of eight (8) bins of watermelons in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent. Respondent filed a verified answer to the complaint, generally admitting the factual allegations, admitting acceptance of the watermelons, but alleging that four bins had to be disposed of as a result of a health embargo placed on the watermelons by the State of Idaho health authorities.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20), is, therefore, applicable. Pursuant to this procedure the verified pleadings of the parties are considered part of the evidence of this case, as is the Department's Report of Investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement with one verified statement by a witness. Complainant filed a brief.

*Editor's note: This decision is being republished because page 1580 was omitted when originally published at 46 Agric. Dec. 1579.

Findings of Fact

1. Complainant, Myco Enterprises, is a partnership composed of Ed Yaksitch and Timonthy E. Yaksitch, whose mailing address is P. O. Box 5 Lamont, California 93241.

2. Respondent, Boise Farmers Market, Inc., is a corporation whose addr is P. O. Box 9374, Boise, Idaho 83707. At the time of the transaction alle herein, respondent was licensed under the Act.

3. On or about June 23, 1985, complainant sold to respondent for delive in interstate commerce, one truckload of bulk watermelons, consisting of e (8) bins totalling 10,480 pounds, at a price of $494.00 for the watermelons p $156.00 for the bins. Thus, the total cost of the shipment was $650.00, fo

4. The produce described in paragraph 3 was shipped on June 23, 1985, a arrived in Boise, Idaho, at respondent's place of business where it w received and accepted by respondent.

5. Respondent has failed to pay any part of the price for the watermelo and the bins.

6. The complaint was filed on January 21, 1986, which was within n months after the cause of action herein accrued.

Conclusions

It is clear that the watermelons were received and accepted by respond on or about June 23, 1985. The facts also reveal that during the ensuing days, respondent sold about half the watermelons, and that on July 11, 19 those which were unsold were embargoed because of possible pestici contamination. The facts also reveal that respondent endeavored to procu from complainant documentation to show there was no contamination, b failed to do so until four months later even though complainant signed certificate with respect thereto on July 11, 1985. Respondent dumped t embargoed melons on July 18, 1985.

There is no issue with regard to the melons which respondent sold. It liable for their full purchase price. Having submitted a check for them whi was returned for insufficient funds, it is still liable to make payment. Th issue with respect to the remainder of the melons, namely three bins pl about 100 melons remains to be resolved. Based on the evidence in th proceeding, we conclude that complainant must prevail.

The transaction with which we are concerned in this proceeding is a f.o transaction. Complainant was required to provide melons which were i suitable shipping condition. (7 C.F.R. § 46.43(i)) One aspect of the suitab ping condition requirement is that they make good delivery. (7 C.F.R.) A corollary aspect is that they must be merchantable at destinatio *and Little Packing Co. v. United Fruit & Produce Co.*, 16 Agric. De 1066 (1957). Clearly, the melons were merchantable when they arrived respondent's place of business on or about June 23, 1985. However respondent became responsible for any change in the condition of th watermelons once they were received and accepted by respondent. The remained in respondent's inventory for 19 days until the state of Idaho place an embargo on the sale of the remainder of the watermelons on July 11, 19

Having received and accepted the watermelons, respondent has the burde to show complainant breached the contract. Respondent's proof consisted o uncontroverted allegations that on July 11, 1985, it asked complainant t furnish proof that the field from which the melons were harvested had n sticide, Aldecarb, that complainant immediatel

secured such proof, but failed to provide it until many months later, far too late to help respondent. We need not decide whether complainant breached a duty to respondent by failing to deliver proof of the growing condition of the watermelons in a timely fashion, or whether the respondent must bear the risk of governmental intervention.

Respondent provided no reliable evidence as to the condition of the watermelons on the date of the embargo. No inspection, federal or otherwise, was taken of their condition. No evidence was presented by respondent regarding the condition the watermelons were stored at. Agriculture Handbook Number 66, "The Commercial Storage of Fruits, Vegetables and Florist and Nursery Stock, with respect to watermelons:

> Watermelons are not adapted to long storage. At low temperatures they are subject to various symptoms of chilling injury and loss of quality, and at high temperatures they are subject to decay. Between 10° and to 15° C. (50 to 50° F.) is a good compromise. Watermelons should keep at this temperature range for 2 to 3 weeks; some will keep longer. Melons held 6 weeks at room temperature will have poor flavor. (at 62)

The period of time involved from receipt and acceptance of the watermelons until the date of the embargo, approached the end point of the 2 to 3 week "keeping period." Thus, the conditions under which the watermelons were stored becomes critical. If stored outside under non-temperature controlled conditions during the period of late June to mid July, at temperatures above 60° F., it would be logical to conclude that their quality would suffer at a somewhat faster rate. Given that the record of this case provides no evidence of the watermelons' condition on July 11th, and given the likelihood that the storage conditions had higher temperatures than what is recommended by the Department's handbook, which would result in faster deterioration, we cannot find the produce was in merchantable condition July 11, 1985, which would be necessary to find the complainant breached a duty.

We recognize that section 2-607 of the Uniform Commercial Code provides that where the goods have ben accepted, the buyer must within a reasonable time after he discovers any breach notify the seller of the breach or be barred from any remedy. Section 2-714 of the Uniform Commercial Code provides that when goods have been accepted and the seller has been given notification, the buyer may recover as damages for any non-conformity of the goods the loss resulting from the seller's breach. Section 2-717 of the Uniform Commercial Code provides that the buyer may deduct all or any portion of the damages as a result of the breach from any part of the price still due under the same contract. Under the proper circumstances, we might find a breach of contract by the seller, where produce has been accepted but is later found to be unmerchantable. However, the facts of this case do not justify such conclusion.

Order

Within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, $650.00 with interest thereon at the rate of 13% per annum from August 1, 1985, until paid.

Copies of this Order shall be served upon the parties.

DAN R. DODDS, d/b/n KUNZ AND DODDS FARMS, a/t/a PELICAN'S PRIDE POTATOES v. PRODUCE PRODUCTS, INC.
PACA Docket No. 2-7493.
Decision and Order Issued January 13, 1989.

Burden of proof-contract modification - Potatoes-when Fusarium Tuber Rot develops - Inspections-timeliness.

As the party claiming a modification of the contract, respondent had the burden to prove it occurred. It failed to do so since a bare allegation is not evidence. An inspection eight days after arrival of potatoes does not reflect their condition on arrival. Neither can respondent prevail on the grounds there was excessive decay, since Fusarium Tuber Rot can commence at any time.

Jory M. Hockberg, Presiding Officer.
William B. Wyllie, for Complainant.
Respondent, Pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter the Act. On April 1, 1986, complainant filed an informal complaint in which complainant sought an award of reparation against respondent in the amount of $6,778.38 in connection with the sale of a carload of potatoes in interstate commerce. The formal complaint was then filed on October 1, 1986. A copy of the report of investigation prepared by the Department was served on each of the parties, and respondent was served with a copy of the complaint. In response to the complaint, respondent filed an answer in which it admitted owing $533.99 and denied any further liability thereunder. Thereafter, on June 8, 1987, an order was issued requiring respondent to pay that undisputed amount to complainant, with interest.

Since the amount claimed as damages does not exceed $15,000.00, the shortened method of procedure set forth in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Under this procedure, the verified pleading of the parties are considered a part of the evidence herein, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of additional sworn statements. Complainant's statement was rejected on the ground that it was not timely filed. Respondent did not file an additional statement, and neither party availed itself of the opportunity to file briefs.

Findings of Fact

1. Complainant, Dan R. Dodds, is an individual doing business as Kunz and Dodds Farms, and also as Pelican's Pride Potatoes. Complainant's business mailing address is P.O. Box 543, Malin, Oregon 97632.

2. Respondent, Produce Products, Inc., is a corporation whose business mailing address is 231 E. Imperial Highway, Fullerton, California 92635. At the time of the transaction involved herein, respondent was licensed under the Act, and subject to its provisions.

3. On or about December 19, 1985, in course of interstate commerce, complainant, by oral contract, sold to respondent one carload of potatoes, a perishable agricultural commodity, f.o.b. as follows:

QUANTITY	SIZE	GRADE	BRAND	WEIGHT	PRICE	AMT
110	50#	1	Pelican's Pride 4-8 oz 120s	5,500	$2.625	$ 288.75
347	50#	1	Pelican's Pride 6-8 oz 100s	17,350	3.125	1,088.38
356	50#	1	Pelican's Pride 8-10 oz 90s	17,800	4.375	1,557.50
434	50#	1	Pelican's Pride 10-12 oz, 80s	21,700	5.375	2,332.75
74	50#	1	Pelican's Pride 12-14 oz, 70s	3,700	5.375	397.75
125	100#	2	Pelican's Pride #2 Baker's Burlap	12,500	3.25	406.25
75	100#	2	Pelican's Pride #2's Burlap	7,500	3.25	243.75
178	50#	1	Pelican's Pride #1 Baker Carton	8,900	2.625	467.25
						6,778.35

4. On or about December 21, 1985, complainant shipped from loading point in Oregon, to respondent's customer in Arizona the kind, quality, grade and size of the potatoes called for in the contract referred to in Finding of Fact No. 3 above.

5. Respondent accepted the potatoes shipped by complainant, but has failed to make full payment for this shipment.

6. The informal complaint in this proceeding was filed within nine months after the cause of action accrued.

Conclusion

a modification of the original contact. *D.M. Steel & Son v. National Produce Distributors, Inc.*, 17 Agric. Dec. 913 (1958); *R.D. McGinnis Produce v. Pinder Produce Co.*, 28 Agric. Dec. 249 (1969). Respondent's bare allegation does not satisfy this burden.

Accordingly, respondent accepted the potatoes and has the burden of establishing a breach of contract and the damages suffered from that breach. Respondent points to inspections which were made after arrival as proof that the potatoes failed to grade. Specifically, respondent states that one such inspection "showed 9% dry rot which does not occur during transit. This had to be a pre-existing condition." Again, however, the evidence upon which respondent relies is not sufficient to carry its burden of proof. The inspections arranged for by respondent took place on January 8 and 9, 1986, while the railcar was released for shipment on December 21, 1985, and arrived in Phoenix, Arizona, on December 30, 1985. It has been previously held that dry type Fusarium Tuber Rot can develop after arrival of a shipment of potatoes and is not necessarily a pre-existing condition. In *Auster Co. v. Nash De-Camp Co.*, 20 Agric. Dec. 115 (1961), it was specifically held that an inspection conducted seven days after the arrival of a carload of potatoes was insufficient to prove that the potatoes were not U.S. No. 1 grade on arrival where the inspection revealed average grade defects of 4% and average condition defects of 6%, and where dry rot was present. In the present case, the two inspection certificates show average grade defects of 3% and 5%, and average condition defects of 9% and 3%, respectively. In addition, while respondent alludes to temperature problems and to technical difficulties at the railroad which delayed placement of the car for more than one week, the risks associated with transit problems were on the respondent since this was an f.o.b. sale (7 C.F.R. § 46.43 (i). Therefore, there is insufficient evidence for respondent to fulfill its burden of proving that the potatoes failed to make good delivery. *Hastings Potato Growers Association v. Sam Pasekoff Company*, 18 Agric. Dec. 922 (1959).

Respondent's failure to pay the full purchase price of the potatoes is a violation of Section 2 of the Act. Since an order has already been issued requiring payment of the undisputed amount of $533.99, complainant should be awarded the balance of $6,244.39, with interest.

Order

Within thirty days from the date of this Order, respondent shall pay to complainant, as reparation, $6,244.39, with interest thereon at the rate of 13 percent per annum from February 1, 1986, until paid.

Copies of this Order shall be served upon the parties.

HOMESTEAD POLE BEAN CO-OP. v. SO FRESH PRODUCE CO., and/or BALL BROKERAGE CO., INC.
PACA Docket No. 2-7523.
Decision and Order issued January 13, 1989.

Price Arrival Contracts - Deferred Billing Contracts - Duties of Broker.

Complainant sued purchaser and broker for failing to pay fully for seven loads of potatoes. It claimed it was due amounts if invoiced because contracts were on a "price arrival" basis. However, "price arrival" contemplates a mutual agreement as to price and complainant established prices unilaterally. Respondent claimed sales were on a "deferred billing" basis.

However, deferred billing has no trade meaning. Since no price was agreed on, complainant was entitled to the fair market price. It failed to show that the price paid by the buyer was not fair. The broker did not carry out its duties to negotiate the prices for the loads. However, it could not be held liable because complainant did not prove it had been damaged.

George D. Becker, Presiding Officer.
Norman A. Shore, for Complainant.
Respondent, Pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

Preliminary Statement

This is a reparation proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act of 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely formal complaint was filed on November 6, 1986, in which complainant alleged that respondent owed $11,415.00 in connection with seven shipments of potatoes in interstate commerce. Respondents filed separate answers to the complaint in which they denied the allegations contained therein. Because the amount in controversy is less than $15,000.00, the shortened method of procedure provided in section 47.20 (7 C.F.R. § 47.20) of the Rules of Practice issued pursuant to the Act is applicable. Complainant, Homestead Pole Bean Co-op, is a corporation located in Naranja, Florida. Respondent, So Fresh Produce Co., is a corporation located in Rosemont, Illinois. Respondent, Ball Brokerage Co., Inc., is a corporation located in Scranton, Pennsylvania. At the time of the transactions involved in this proceeding, both respondents were licensed under the Act.

Findings of Fact

1. Between April 18, 1986, and April 25, 1986, complainant sold and shipped to respondent, So Fresh, seven truckloads of potatoes. The prices at the time of sale and shipment were not determined. Complainant believed that it was selling the potatoes on a price on arrival basis or F.O.B. Respondent, So Fresh, believed that it would pay for the potatoes on a deferred billing basis.

2. So Fresh and complainant dealt with each other indirectly through respondent, Ball Brokerage, and did not talk with each other with respect to these transactions either before they were entered or afterwards. Complainant sent timely invoices to respondent, So Fresh, setting forth total contract prices, including freight of $7,862.50, $6,162.50, $5,950.00, $5,950.00, $3,800.00, $6,300.00, and $5,950.00, for a total price for the seven transactions of $42,187.50. Each invoice contained at the bottom thereof the statement "No adjustments of any kind will be made in price or amount unless shipper is notified, in writing, within 12 hours of arrival, and federal inspection obtained, if requested by shipper." Respondent, Ball Brokerage, sent broker's standard memoranda of sale with respect to each transaction to the parties. Each memorandum stated that the billing would be on a deferred basis. Subsequently, respondent, Ball Brokerage, filled in the memoranda, writing various prices based upon its discussions with respondent, So Fresh.

3. Respondent, So Fresh, in negotiations with Ball Brokerage, settled on the deferred billing basis for the seven truckloads of potatoes at $30,772.50, leaving $11,415.00 in dispute. So Fresh paid, and complainant accepted, the undisputed amount of $30,772.50. Respondent, So Fresh in settling for the seven truckloads of potatoes, dealt only with Ball Brokerage. There is no

indication that Ball Brokerage conveyed the substance of its negotiations to complainant.

Discussion

This proceeding involves seven transactions in which complainant sold to respondent, So Fresh, truckloads of potatoes through Ball Brokerage, acting as the intermediary broker. Complainant and So Fresh did not talk to each other. From the record, we glean that complainant, at the end of its marketing season in 1986, wished to dispose of its remaining crop. It contacted Ball Brokerage, and reflected its need to dispose of the potatoes in an efficient manner. It pursued Ball Brokerage to find outlets for the potatoes. Complainant reflected in four transactions that it was willing to wait until the potatoes were received by the purchasers thereof before arriving at a price. In three transactions it believed it had made f.o.b. sales. It believed it had entered into a contract under which "price upon arrival" terms for the establishment of the price or f.o.b. terms were agreed to. So Fresh, on the other hand, believed that the contract called for deferred billing. Ball Brokerage sent memoranda of sale to So Fresh reflecting that the terms included deferred billing. While complainant denies that it received these memoranda, Ball Brokerage stoutly insists that it sent them to it, and provided an affidavit by Mary Miles Murphy, its Office Manager, in which she states that the business practice of Ball Brokerage is to send broker's memoranda at the time of the entry of the transaction, and that such memoranda were sent to complainant with respect to the seven transactions involved in this proceeding. Complainant did not controvert that affidavit subsequent to its being made. Therefore, we find, based upon a preponderance of the evidence, that Ball Brokerage did send the seven confirmations of sale to complainant in the same manner as it sent them to respondent. Those confirmations of sale reflected that the transactions were not on a price arrival or f.o.b. basis, but rather were on a deferred billing basis.

The case is complicated because complainant sent timely invoices to So Fresh, reflecting prices it unilaterally established for each truckload of potatoes. On the invoice was the pre-printed statement that a purchaser must notify the shipper in writing within 12 hours of the time of arrival of the product in order to have an adjustment of any kind honored, presumably including an adjustment in the price. Complainant contends that this statement, and So Fresh's failure to object to the prices on the invoices when it received them, is sufficient for it to be entitled to the prices established therein. We cannot agree. Pursuant to 7 C.F.R. § 46.43 (cc):

it was operating on a deferred billing basis, we cannot find that it had any obligation over a short period of time to contest the prices placed on the invoices which it received. Its failure to do so is not a circumstance sufficient for us to conclude that it agreed to the prices unilaterally established by complainant. Because of this, we cannot find against So Fresh on the basis that the prices established by complainant, f.o.b. or on arrival, were mutually agreed to.

A more difficult question, however, is what price was appropriate for the potatoes which were sold to respondent, So Fresh. So Fresh negotiated what it called a deferred billing price for each shipment, not with complainant, but rather with respondent, Ball Brokerage. The record is bereft of any indication as to the basis on which So Fresh and Ball Brokerage arrived at a final price to be paid to the complainant. In *Slayman Fruit Co. v. Wholesale Produce Supply, Inc.*, 30 Agric. Dec. 1751, (1971) this tribunal stated with respect to deferred billing arrangements as follows:

> "Deferred Billing" or "Deferred Unit Price" are not defined in the regulations under the Act. The word "deferred" means "postponed" and an invoice is often referred to as a bill. The terms used by the parties and the broker, and their subsequent course of performance, indicate to us that the parties intended to enter into a contract of sale whereby the grapes would be shipped by complainant to respondent and after arrival of the grapes the parties would negotiate as to a price. In this connection, Section 2-305 (1) of the Uniform Commercial Code provides that: "The parties if they so intend can conclude a contract of sale even though the price is not settled". If the parties had intended the transaction to be a consignment, that is, respondent would dispose of them for complainant's account, it seems logical that the word "Consignment" or "Consigned" would have been used by the parties and the broker."

In this proceeding, there is no indication that the parties intended that there would be a consignment. Rather, the transactions appear to have been simple purchase and sale transactions. Therefore, we cannot conclude that an account of sales with respect to each shipment would establish the price to be paid to complainant for the potatoes. Rather, the price could best be established based upon market price at the time of arrival of the goods. While complainant made vague statements to the effect that the prices it was charging were market price, we are not able to conclude that the prices it stated were the market prices because it failed to support it's contentions with documentary evidence. Furthermore, we are impressed by the fact that complainant was very eager to get rid of the potatoes, and apparently was willing to compromise the price which it charged at least at the time it talked with Ball Brokerage and shipped the potatoes. Based upon these considerations, we find with respect to So Fresh that it was reasonable in the manner in which it dealt with complainant, namely at arms length through Ball Brokerage. So Fresh had no reason to believe that the prices it saw on the invoices it received truly reflected the prices which were to be paid, particularly since Ball Brokerage was evidently telling it that it was to honor the deferred billing arrangement as reflected on the broker's memoranda of sale. As the proponent of the terms of the contracts, complainant had the burden to show what there were. It did not show that there were firm prices. It also had to show that the prices paid by So Fresh were unreasonable. Having failed to show that the prices paid by So Fresh for the potatoes were

unreasonable, we conclude that the $30,772.50 paid by So Fresh was a reasonable price insofar as the seven transactions are concerned. Therefore, the complaint must be dismissed insofar as So Fresh is concerned.

We must also deal with the question as to whether there is liability on the part of Ball Brokerage. Pursuant to 7 C.F.R. § 46.28 (a):

> The function of a broker is to negotiate, for or on behalf of others, valid and binding contracts. A broker who fails to perform any specification or duty, express or implied, in connection with any transaction is in violation of the Act and is subject to the penalties specified in the Act and may be held liable for damages which accrue as a result thereof. It shall be the duty of the broker to fully inform the parties concerning all of the terms and conditions of the proposed contract. After all parties agree on the terms and the terms and the contract is effected, the broker shall prepare in writing and deliver promptly to all parties a properly executed confirmation or memorandum of sale setting forth truly and correctly all of the essential details of the agreement between the parties, including any express agreement as to the time when payment is due.

We find, based upon our examination of the available evidence in this proceeding that Ball Brokerage failed to carry out a specified duty as a broker insofar as it did not negotiate with complainant as regards to the amount of money which So Fresh would pay for each load of potatoes. Rather, the evidence is clear that Ball Brokerage and So Fresh worked together to determine the price to be paid to complainant without talking to complainant with respect thereto. There is no evidence in the record to support the agreement by Ball Brokerage with respect to each transaction that the amount paid by So Fresh was appropriate. Evidence of this kind would have been evidence as to the amount of the money fetched by So Fresh on resale of the potatoes. However, we find based upon a preponderance of the evidence that Homestead Pole Bean was seeking to dispose of the potatoes in a hurry, and was willing to take a lesser price because of its desire to do so. Thus, there is no evidence that the price paid by So Fresh was other than a fair price. The discount from what complainant claims was the prevailing market price for each transaction is not so substantial as to lead us to the conclusion that it was unfair. Essentially, the discount was about $2.00 per 50 pound sack of potatoes. Therefore, although we find that Ball Brokerage violated the Act by failing to carry out a duty in connection with its activities as a broker, we cannot find that its failure to carry out its duties to inform both parties as to what was going on resulted in any damages to complainant. This is particularly the case since we find based upon a preponderance of the evidence, and the uncontroverted sworn statement of Ball Brokerage in its answer that the broker's memoranda were sent to complainant, thereby allowing complainant to raise questions at an early time as to the nature of the billing methodology for the transactions, that the violations by Ball Brokerage did not result in damage to complainant. In view of the above, the complaint against Ball Brokerage must also be dismissed.

Order

The complaint in this proceeding is dismissed.

Copies of this Order shall be served upon the parties.

BAKER PRODUCE, INC. v. BALL BROKERAGE CO., INC., and/or ANTHONY'S PRODUCE, INC.

PACA Docket No. R-88-17.
Decision and Order Issued January 17, 1989.

Grade Guaranteed to Destination-meaning - Protection through Sale-meaning - Deferred Billing-meaning - Agency-reliance - Brokers-liability for failure to perform duties - Contracts-when binding.

In two transactions, the broker failed to perform its duties, and was liable to complainant in the first instance for the full contract price. In one of the two transactions, the purchaser was liable in the alternative because it had entered a binding contract with the seller, and erroneously relied on the apparent authority of the broker which improperly altered the terms of the contract without authority from the seller. the terms "Grade Guaranteed to Destination," "Protection Through Sale" and "Deferred Billing" are discussed.

George D. Becker, Presiding Officer.
Complainant, Pro se.
William J. Fair, for Respondents.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

Preliminary Statement

This is a reparation proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act of 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely informal complaint was filed on April 3, 1987, in which complainant alleged that respondents, jointly and severally, owed $9,425.00 in connection with two transactions involving the sale of railroad cars of potatoes in interstate commerce. A formal complaint was filed on July 6, 1987. Respondents filed separate answers in which they denied the allegations of the complaint. Because the amount in controversy is less than 15,000.00, the shortened method of procedure provided in section 47.20 (7 C.F.R. § 47.20) of the Rules of Practice issued pursuant to the Act is applicable. Complainant, Baker Produce, Inc., is a corporation located in Kennewick, Washington. Respondent, Ball Brokerage, Inc., is a corporation located in Scranton, Pennsylvania. Respondent, Anthony's Produce, Inc., is a corporation located in Newfield, New Jersey. At the time of the transactions involved in this proceeding, both respondents were licensed under the Act.

Findings of Fact

1. On September 5, 1986, complainant sold to Anthony's Produce, a railroad car of potatoes for a total contract price of $18,235.50, f.o.b., with grade guaranteed to destination. Respondent, Ball Brokerage, was the broker in this transaction. The carload of potatoes was shipped from the state of Washington to Philadelphia, Pennsylvania, where it was received and accepted by Anthony's Produce.

2. Ball Brokerage issued a standard broker's memorandum of sale which set forth the prices of the various sizes of the potatoes, and the fact that the grade of the produce was guaranteed to destination. Complainant provided an invoice to Anthony's Produce which set forth the prices of the potatoes, and the total amount due. Net payment was due in 30 days, according to that invoice. Subsequently, Ball Brokerage sent complainant a "Notice of Complaint" dated September 15, 1986. It stated that the potatoes had 3% growth cracks and mechanical damage, and an average of 2% damage by surface discoloration. In addition, it stated that some of the cartons showed sprouts in the potatoes which were barely visible up to 1/4 inches in length.

When complainant received the Notice of Complaint, it inscribed thereon the words "not acceptable send copy of USDA inspection," and returned a copy of such Notice of Complaint to Ball Brokerage. The Notice also stated as regards Action Taken "On Record, protection through sale."

3. Ball Brokerage granted to Anthony's Produce adjustments with respect to this contract without authorization from complainant. The total amount of the adjustments was $6,524.00. Anthony's brokerage paid complainant $10,436.00 of the $16,960.00 originally invoiced, leaving $6,524.00 unpaid.

4. There was a federal inspection performed with respect to these potatoes on September 15, 1986. It did not show exactly what Ball Brokerage told complainant on its Notice that it contained. The inspection showed only an average of 2% damage by surface discoloration and some minimal sprouting, with less than one half percent soft rot. It also showed that the grade defects were within tolerance and that the potatoes graded U.S. No. 1.

5. On September 16, 1986, complainant shipped to Anthony's Produce a railroad car of potatoes. It invoiced Anthony's Produce $18,188.50 for this railroad car of potatoes. Upon arrival, Anthony's Produce received and accepted the potatoes. Ball Brokerage was the broker with respect to this transaction.

6. Ball Brokerage told different stories to complainant and Anthony's Produce with respect to the transaction set forth in paragraph five, above. It reflected to complainant that Anthony's Produce would pay a total contract price of $18,188.50. It reflected to Anthony's Produce that the potatoes were to be sold to it on a "deferred billing" basis. As a result, there was no binding contract entered between complainant and Anthony's Produce. Anthony's Produce eventually paid complainant $15,287.50 on this contract, leaving $2,901.00 in dispute.

7. In a document called Notice of Complaint sent by Ball Brokerage to complainant on September 25, 1986, Ball Brokerage stated that the potatoes set forth in paragraph five, above, showed considerable grade defects in terms of sunburn and scabs and damage by internal black spot in the amount of 6%, and discoloration averaging 7%. Others of the potatoes were said to show 3% grade defects by sunburn and scabs and 3% hollow heart, 3% damage by surface discoloration, and some other damage in the form of slimy soft rot to the amount of 2%. When complainant received the Notice, it puts a notation thereon of "not aeceptable send copy of USDA inspection".

8. A federal inspection was performed with respect to this load of potatoes on September 25, 1986. It showed that the grade condition defects were as set forth in the Notice provided by Ball Brokerage.

9. Ball Brokerage failed to carry out its duties as broker with respect to both transactions involved in this proceeding.

Discussion

This proceeding involves a dispute between the seller of two railroad cars of potatoes and the purchaser and broker involved. Complainant contends that it sold the carlots to Anthony's Produce for specific prices. Anthony's Produce admitted that with respect to the carlot which was sold on September 5, 1986, it bought the potatoes for a total contract price of $16,960.00. With respect to the second carlot of potatoes which were shipped on or about September 16, 1986, Anthony's Produce contends that they were shipped on a deferred billing basis. Complainant on the other hand, contends that it sold them for a firm contract price of $18,188.50. In order to resolve the issues in this proceeding, it has been necessary to read thoroughly the voluminous

documentation provided by all three parties. Fortunately, we have been able, by reading these documents, to come to firm conclusions as to what actually happened. As a result, it is possible to disentangled the various stories, and apply applicable law to the facts as they exist.

Insofar as the carlot of potatoes which was sold and shipped by complainant to Anthony's Produce on September 5, 1986, is concerned, both parties agreed that there was a contract price of $16,960.00 f.o.b., with net payment to be made in 30 days. It is further agreed that Ball Brokerage acted as the broker for this transaction. The documentation shows that Ball Brokerage issued a broker's memorandum of sale which reflected that the potatoes were sold with grade guaranteed to destination. While complainant did not believe that it entered into a contract with grade guaranteed to destination, it accepted this statement by Ball Brokerage on the basis of the provision of the broker's memorandum. Ball Brokerage, however, then proceeded to send a corrected statement in which it stated that there was protection through sale of the goods. Baker Produce refused to accept this manifestation as to the terms of the contract when it received the document which contained that statement. Complainant also refused to accept the statements made by Ball Brokerage as regards the amount of condition and grade defects allegedly contained in the load of potatoes. It was wise to do so. When it received the inspection certificate, the inspection certificate showed that there were no grade defects shown thereon. Therefore, the statement "grade guaranteed to destination" did not come into play. Indeed, insofar as condition defects were concerned, the potatoes also made good delivery.

While Ball Brokerage contended that it had extensive dealings with representatives of complainant which resulted in a large allowance of $6,524.00 with respect to the September 5, 1986, load of potatoes, complainant asserted that it did not deal in this manner with Ball Brokerage. We find based upon our analysis of the evidence that there is no reason to believe that complainant dealt with Ball Brokerage in this manner. Its actions, reflected by the documents introduced in this proceeding, show that Baker Produce never agreed to a modification of contract terms. Rather, it is very clear that Ball Brokerage unilaterally undertook to reduce the amount to be paid by Anthony's Produce, probably telling Anthony's Produce that it had dealt with Baker Produce to achieve the reduction.

In view of our finding with respect to the above transaction, we conclude that a firm contract for sale between Anthony's Produce and Baker Produce for a total contract price of $16,960.00 was entered. A receiver of produce relies upon the representations of a broker as an ostensible agent of the shipper at its peril. *Martin Produce, Inc. v. C. Basil Co., Inc.*, 30 Agric. Dec. 836 (1971). Since we have found that Baker Produce did not grant an adjustment with respect to the September 5, 1986, transaction, Anthony's Produce is liable for the full contract price, except that if the primary party responsible for the reduction in price, namely Ball Brokerage, pays that amount, Anthony's Produce shall not be liable.

Ball Brokerage is liable for the difference between the contract price and the amount paid, or $6,524.00. Normally, unless otherwise agreed upon a broker's duties terminate when a contract is entered. *Gonzales Packing v. Price*, 25 Agric. Dec. 390 (1966). There is nothing in this record to reflect that Baker Produce ever agreed to permit Ball Brokerage to act as an intermediary between it and Anthony's Produce after the contract was entered. We find that Ball Brokerage unilaterally under took to adjust the contract price for its own reasons without authority. Pursuant to 7 C.F.R. § 46.28 (a).

"The function of a broker is to negotiate, for or on behalf of others, valid and binding contracts. A broker who fails to perform any specification or duty, express or implied, in connection with any transaction is in violation of the Act and is subject to the penalties specified in the Act and may be held liable for damages which accrue as a result thereof. . . . A broker who issues a confirmation of memorandum of sale containing false or misleading statements shall be deemed to have committed a violation of Section 2 of the Act.

In view of the above regulation imposing duties on Ball Brokerage, by finding that Ball Brokerage deliberately failed to perform its duties as required, we find that it has violated Section 2 of the Act and should be held liable in the first instance for damages for the contract amount not paid by Anthony's Produce. If Ball Brokerage pays this amount, Anthony's Produce shall not be liable to pay it. If, Ball Brokerage should fail to pay this amount to complainant, then Anthony's Produce must be held liable to pay this amount since a binding contract was entered, and it was not modified by complainant.

With respect to the second transaction, the result is somewhat different. Although complainant contends that it entered a binding contract with Anthony's Produce, Anthony's Produce state that it purchased the potatoes on a deferred billing basis. Deferred billing means that there will be no price established until after the goods have arrived at destination. See *Slayman Fruit Co. v. Wholesale Produce Supply, Inc.*, 30 Agric. Dec. 1751, 1755 (1971). We find based upon our analysis of the evidence that both parties have accurately stated their understanding as regards to the contractual arrangement. The problem lay with Ball Brokerage which made on set of representations to Baker Produce and another to Anthony's Produce. Although documentation provided by Ball Brokerage does not reflect anything other than that there was to be deferred billing, the veracity of Ball Brokerage is in serious issue in this proceeding. Because Baker Produce and Anthony's Produce understood the terms of the contract to be different, there is no binding contract. See *W. W. Rodgers & Sons v. California Produce Distributors, Inc.*, 34 Agric. Dec. 914 (1975). As a result, Anthony's Produce is entitled to receive the potatoes at their fair market value. No evidence was provided to show that the $15,287.50 it paid to Baker Produce was other than fair market value. Therefore, with respect to the second transaction, the complaint must be dismissed as to Anthony's Produce.

With respect to the second transaction, we find that Ball Brokerage is liable. Referring back to 7 C.F.R. § 46.28 (a), "If the broker's records do not [illegible]tions that a binding contract was made with proper notice [illegible]broker may be held liable for any loss or damage resulting [illegible]e, . . ." A binding contract was not entered. As a result [illegible]actions, complainant was deprived of $2,901.00 which it [illegible] received. We find that Ball Brokerage owes [illegible] this amount because of its negligence in perfecting a binding contract. Its failure to do so is a violation of Section 2 of the Act.

In view of the above, we hold that Ball Brokerage shall pay the complainant $9,425.00 with interest thereon at the rate of 13% per annum until paid. In the event Ball Brokerage has not paid $9,425.00 within 30 days from the date of this order, then Anthony's Produce shall pay any unpaid amount up to $6,524.00 with respect to the first transaction, with interest thereon at the rate of 13% per annum until paid. The failure of both parties to pay the amounts specified herein constitutes the violations of Section 2 of

the Act for which reparation must be awarded. Any payments by Ball Brokerage up to $2,901.00 shall be attributed in the first instance to the transaction which occurred on September 16, 1986. Any amount paid over that amount shall be attributed to the transaction which occurred on September 5, 1986.

Order

Within 30 days from the date of this Order, Ball Brokerage shall pay the complainant $9,425.00, with interest thereon at the rate of 13 percent per annum from November 1, 1986, until paid.

In the event Ball Brokerage does not pay $9,425.00 to Baker Produce, Anthony's Produce shall be liable for any amount not so paid up to $6,524.00, with interest thereon at the rate of 13 percent per annum from November 1, 1986, until paid.

Copies of this Order shall be served upon the parties.

DELBERT T. REEDER, d/b/a THREE OAKS FARMS v. EASTERN GROWERS & SHIPPERS, INC.

PACA Docket No. 2-7345.
Decision and Order issued February 10, 1989.

Accord and Satisfaction.

When complainant negotiated a check for less than it claimed when there was a dispute as to the amount respondent owed, and the check stated "Account Sales Paid in full," there was an accord and satisfaction, and the complaint was dismissed.

George S Whitten, Presiding Officer.
Complainant, Pro se.
William N. Asma, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a, *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $44,037.49 in connection with the shipment in interstate commerce of numerous truckloads of cabbage.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant, and asserting a counterclaim in the amount of $7,381.09 arising out of the same transactions. Complainant filed a reply to the counterclaim denying any liability thereunder.

Although the amount claimed in the formal complaint exceeds $15,000, the parties waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening

statement, respondent filed an answering statement, and complainant filed statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant, Delbert T Reeder, is an individual doing business a Three Oaks Farms, whose address is 2107 Seventh St. West, Palmetto Florida. At the time of the transactions involved herein, complainant was no licensed under the Act.

2. Respondent, Eastern Growers & Shippers, Inc., is a corporation whose address is P.O. Box 1451, Sanford, Florida. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about December of 1984, complainant and respondent entered into a joint venture calling for complainant to produce cabbage on approximately 90 acres of land rented by complainant, and for respondent to market such cabbage. Respondent was to furnish the major cash outlays necessary for the production of the cabbage, and complainant was to furnish land, equipment, and labor. It was also agreed that respondent would receive a ten percent selling fee. Under the agreement, the parties were to split the profits of the venture.

4. Respondent sold the cabbage crop for gross proceeds of $326,366.25. Respondent incurred inspection, freight, and other costs involved in transporting the cabbage to its dock in the total amount of $23,086.62. In addition, respondent incurred the following expenses: crates-$69,774.76; labor-$33,726.90; plants-$24,134.94; adjustment-$12,806.40; fertilizer-$12,597.69; and land rent-$7,875.00. Respondent's ten percent selling fee amounted to $30,429.37. The total profit from the cabbage joint venture amounted to $111,934.57, one half of which, or $55,967.29 was due to complainant. Respondent has paid complainant $63,800.88, or $7,833.59 more than owed.

5. An informal complaint was filed on August 1, 1985, which was within nine months after the cause of action alleged herein accrued.

Conclusion

The contract between the parties herein was verbal, and neither party is entirely consistent in its allegations concerning the particulars of the contract. Complainant even denies that the parties entered into a joint venture, but complainant also fails to characterize the contract in any other way, and the facts of the case make it clear that the parties were definitely involved in a joint venture.

We have concluded from an examination of all of the evidence submitted that respondent undertook to finance the cabbage operation by supplying the major cash outlays necessary for the production of the cabbage. Respondent substantially met this obligation. It is clear to us that it was the expectation of the parties that these cash outlays would be deducted from the gross proceeds of the sales of the cabbage as expenses of the joint venture. We do not believe that it was the intent of the parties that expenses incurred by complainant in supplying land, labor, and equipment were also to be deducted from the gross proceeds of the cabbage sales. Our conclusion in this regard is directly contrary to the contentions of complainant. Complainant asserted in connection with the formal complaint that it had incurred expenses in the total amount of $73,312.81, and sought to assign one half of such expenses as expenses of the joint venture. In addition, complainant strongly contended

that the ten percent sales fee which we have allowed respondent should not be allowed.

It is evident to us that the $73,312.81 in expenses which complainant seeks to assign to expenses of the joint venture were an afterthought. Such expenses were submitted by complainant only after a personal report of investigation had been done by this Department. Such personal report of investigation found a balance of only $7,381.09 due to complainant and such amount was found to be due only because the ten percent selling fee of $30,429.37 was not included in the Department's audit.

Complainant relies heavily throughout this proceeding upon the determination of the Department's investigator not to include the selling fee in the audit. However, the preponderance of the evidence in this record after receiving documentation from both parties supports the fact that the parties agreed at the outset to the ten percent selling fee. Accordingly, we have allowed such fee.

While we have found that respondent has overpaid complainant, we cannot make an award for the overpayment under respondent's counterclaim. Complainant was not licensed at the time of the transactions between the parties, and there is no evidence in the record that complainant was operating subject to license. Accordingly, we have no jurisdiction to make any award in respondent's favor against complainant. Both the complaint and counterclaim should be dismissed.

Order

The complaint is dismissed.
The counterclaim is dismissed.
Copies of this Order shall be served upon the parties.

M. S. THIGPEN PRODUCE CO., INC. v. THE PARK RIVER GROWERS, INC.
PACA Docket No. 2-7307.
Decision and Order issued February 27, 1989.

Choice of forum - Jurisdiction - Res Judicata - Counterclaims.

Respondent filed against complainant in a state court. Complainant was forced to file a compulsory counterclaim. Complainant prevailed in state court in the amount of $159,954.42. It is held that complainant did not choose its forum when it filed a compulsory counterclaim, that the state court decision is *res judicata* as to the issues, but not as to the remedy, and that a failure to pay the judgement is a violation of Section 2 of the PACA.

George S. Whitten, Presiding Officer.
Stephen P. McCarron, for Complainant.
Gerry A. Pearson, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perisi Commodities Act, 1930, as amended (7 U.S.C. § 499a ^ complaint was filed on March 12, 1986, in which complai of reparation against respondent in the amount of $139, with the shipment in interstate commerce of multiple tr

potatoes. A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant on the grounds of the alleged sale by respondent to complainant of $146,931.05 worth of potatoes, and on the grounds that complainant had already obtained a judgement against respondent in the Chancery Court for Knox County, state of Tennessee, based upon the same allegations contained in the complaint. Respondent alleged that complainant had made an election of remedies under 7 U.S.C. § 499e (b). Complainant filed a reply to respondent's answer denying the allegations thereof. An opening statement was filed by complainant and respondent was given opportunity by letter dated November 6, 1986, to file an answering statement. Respondent requested an extension of time in which to file the answering statement and an extension was granted until December 20, 1986. On December 3, 1986, respondent's counsel wrote to this Department alleging that a voluntary petition would shortly be filed under Chapter 7 of the Bankruptcy Code. No answering statement was filed, and on December 15, 1986, the parties were given 10 days in which to file briefs. After receiving an extension of time, complainant filed a brief which was subsequently served upon respondent. The file was then referred, on January 28, 1987, to the presiding officer for preparation of his report. Prior to the preparation of the presiding officer's report, this department received a notice that a petition in bankruptcy had been filed by respondent and the case was held in abeyance pending disposition of the bankruptcy proceeding. On August 9, 1988, the Department received notice from complainant's counsel that the bankruptcy proceeding had been dismissed on August 3, 1988. A copy of the order of dismissal was enclosed. Accordingly, this case is now ready for the issuance of an order.

Findings of Fact

1. Complainant, M. S. Thigpen Produce, Co., Inc., is a corporation whose address is Route 1, Box 382 B, Elkton, Florida.

2. Respondent, The Park River Growers, Inc., is a corporation whose address is P.O. Box 237, Park River, North Dakota. At the time of the transactions involved herein, respondent was licensed under the Act.

3. In August of 1985, respondent filed suit in the Chancery Court of Knox County, Tennessee, against Sam Compton Produce Co., Inc., and M. S. Thigpen Produce Co., Inc., seeking to recover the purchase price, in the amount of $146,931.05, relative to numerous shipments of potatoes in interstate commerce. Complainant, M. S. Thigpen Produce Co., Inc., filed an answer and counterclaim in the Tennessee Chancery Court. The counterclaim sought recovery, in the amount of $153,335.46, in connection with all of the transactions included in the formal complaint herein, plus three additional transactions. Such counterclaim was based upon the same allegations as alleged in the formal complaint herein. On March 25, 1986, the Chancery Court for Knox County, Tennessee, issued a final judgement on the merits dismissing in its entirety the complaint of Park River Growers, Inc., and award M. S. Thigpen Produce, Co., Inc., $159,954.42 on its counterclaim against Park River Growers, Inc. The amount of the judgement on the counterclaim included the entirety of the amount which complainant seeks to recover in this proceeding.

4. An informal complaint was filed on January 26, 1986, which was within nine months after the cause of action herein accrued.

Conclusion

Section 5 of the Act (7 U.S.C. § 499e) provides for liability on the part of any commission merchant dealer or broker who violates any provision of Section 2 of the Act to the person injured by such violation and in addition provides that such liability shall be "for the full amount of damages sustained in consequence of such violations." Paragraph (b) of such section provides in addition that:

> Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this Act are in addition to such remedies.

It has long been held that this section requires that an election of remedies be made by a PACA *complainant* as between pursuit of reparation in this administrative forum and pursuit of a civil suit in either state or federal court. See *Rigbee Potato Co. v. Belson Bros.*, 12 Agric. Dec. 750 (1953). See also *Magic Valley Produce, Inc. v. E. & R. Brokerage and/or House of Good Celery, Inc.*, 40 Agric. Dec. 449 (1981) where the suspension of state administrative proceedings at the request of a PACA complainant was deemed a sufficient basis for us to deny a motion for dismissal on the part of one of the respondents on the grounds that the complainant had made an election of remedies. Where, however, the PACA complainant is a party to a proceeding involving the same parties and subject matter in another forum by reason of having file a compulsory counterclaim, it has been held that no election of remedies will be deemed to have been made. See *Abelardo Velderrain v. Dixon Tom-A-Toe Produce, Inc.*, 38 Agric. Dec. 51 (1979). The reason for this rule was set forth in *Trans-West Fruit Co. Inc. v. Ameri-Cal*, 42 Agric. Dec. 1955 (1983):

> The probable binding effect on this forum, under the principles of *res judicata*, of a failure to file a compulsory counterclaim in the state court proceeding, or, at the very least, the obligations of comity and "the national interest in avoiding relitigation of adjudicated issues" would have prevented the complainant here from electing the unique PACA remedy provided by the Act (see 7 U.S.C. § 499g (d)) had complainant not filed a counterclaim in the California Superior Court. The award of reparation against a licensee who violates the Act (enforced by automatic suspension of the license of a party who fails to pay a reparation award) is an integral part of the regulatory scheme set up by Congress for the regulation of the produce industry. See *LeRoy Dyal Co. v. Allen*, 161 F.2d 152 (4th Cir. 1947). Were it not for these factors, comity and the need for efficiency in the administration of justice would dictate that, in spite of the existence of concurrent jurisdiction, we should defer to the California forum.

The refernece to "concurrent jurisdiction" was explained in a footnote as follows:

> It is well established that, under certain circumstances, two forums with concurrent jurisdiction over identical subject matter and parties may [illegible] with the litigation before them. See *Kline v. Burke*

> *Construction Co.*, 260 U.S. 226 (1922) where in regard to such a situation it was stated: "Each court is free to proceed in its own way and in its own time, without reference to the proceedings of the other court. Whenever a judgement is rendered in one of the courts and pleaded in the other, the effect of that judgement is to be determined by the application of the principal of res adjudicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case." See also *Unger v. Mandell*, 471 F.2d 1163 (1972); *Friedman v. N. B. C. Motorcycle Imports, Inc.*, 452 F.2d 1215 (1971) ("the existence of the state court action was not sufficient ground for failure to dispose of issue on trial in the federal action. Both actions could go forward at the same time, with application of the principles of *res judicata* if raised in the later pending action") and 1A, Part 2, J. Moore, *Federal Practice*, section 0.208b (2d ed. 1982). . . .

In this proceeding, complainant's counsel asks us to enter an award of reparation in complainant's favor based upon the *res judicata* effect of the final judgement on the merits entered in the Tennessee court. First, it should be noted that while the full faith and credit clause of the Constitution is applicable in its terms only as between states, the same principle has been made applicable by law (28 U.S.C. § 1738) as between the federal courts and the state courts. The federal statute, enacted pursuant to the Constitutional provision requiring that each state accord "full faith and credit" to the public acts, records, and judicial proceedings of every other state, provides that properly authenticated records and judicial proceedings shall have full faith and credit "in every court within the United States." See *Davis v. Davis*, 305 U.S. 32, 83 L.Ed 26, 59 S.Ct. 3. It is clear, therefore, that as a forum whose orders are appealable to federal district court, with the parties having the right to a trial *de novo* therein based upon the pleadings before the Secretary, we are bound just as the federal district court would be bound, to accord full faith and credit to a valid judgement on the merits rendered by a state court.

Nevertheless, complainant's request raises certain questions which need to be addressed. The pleadings before the Tennessee court did not allege, in either the complaint or counterclaim, a violation of Section 2 of the Perishable Agricultural Commodities Act. That such a violation could have been alleged by either or both parties and that the Tennessee court, as a court of general jurisdiction, could have adjudicated the issue is beyond doubt. The question, therefore arises, as to whether the absence of the issue before the Tennessee forum should be thought to have any significance in regard to our duty to accord full and faith and credit to such forum's judgement. This question must be answered in the negative. It is clear that the counterclaim before the state forum alleged the sale, acceptance, and the failure to pay as between the same parties, and in regard to the same perishable produce, as does the complaint before us. Thus, while one might question whether the judgement of the Tennessee court should be deemed *res judicata* in regard to an alleged violation of the federal statute, its binding effect under the doctrine of collateral estoppel is unquestionable. In *Parklane Hosiery Co. v. Shore*, 429 U.S. 322 (1979), the United States Supreme Court stated the distinction between these two doctrines as follows:

> Under the doctrine of res judicata, a judgement on the merits in a prior suit bars a second suit involving the same parties or their privies

> based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgement in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

The distinction between these two doctrines as further stated by the Court during the same term is as follows:

> This case concerns *res judicata* only, and not the narrower principle of collateral estoppel. Whereas *res judicata* forecloses all that which might have been litigated previously, collateral estoppel treats as final only those questions actually and necessarily decided in the prior suit. *Brown v. Felsen*, 442 U.S. 127, 138, n. 10 (1979).

While it appears from an examination of analogous cases that a number of courts might treat the Perishable Agricultural Commodities Act as creating a distinct cause of action for the violation of Section 2, the general rule and the better rule is to the contrary. Moore, in treating the question makes the following observations:

> What constitutes a single cause of action for these purposes [application of doctrine of *res judicata* barring second suit on same cause of action] has been a troublesome question. Generally, it has been held that the "cause of action," or "claim," as it is referred to in the Restatement (Second) [Judgements], is bounded by the injury for which relief is demanded, and not by the legal theory on which the person asserting the claim relies. Thus, a judgement in an action to settle Indian land claims under the 1881 Treaty was a bar to a second suit involving the same land but relying on the 1895 Treaty. And a judgement in an action in the district court asserting that plaintiff's discharge was a violation of the Age Discrimination In Employment Act barred a subsequent action asserting that the same discharge was a breach of his employment contract. Similarly, a judgement in a possessory action in the state court barred a subsequent action in the federal court charging that his eviction violated his first amendment rights. And a summary judgement for defendant corporation in a suit on a note, pitched on the theory that the corporation was the alter ego of the debtor barred a later suit by the assignee of the note against the receiver of the corporation charging "conspiracy" and "joint venture." As a general principle, then, the plaintiff must assert in his first suit all the legal theories that he wishes to assert, and his failure to assert them does not deprive the judgement of its effect as res judicata.

In this case, we do not have the question of whether a set of facts resulting in an alleged wrong under state law, which has been litigated on the merits and adjudicated in state court, may be again relitigated in a federal forum on the basis of a federal statute which renders the same alleged wrong illegal under federal law. That question, if asked, must, generally speaking, be answered in negative.[1] See *Brown v. DeLayo*, 498 F.2d, 1173 (1974). But in this case, we are not concerned with a question of relitigation but rather with whether a litigant who has been compelled to plead in another forum, and has been successful on the claim so pleaded, may receive the benefit of the unique federal remedy for his claim of which he has previously done everything within his power to avail himself.

[1]However, there are exceptions. The general question is treated by M (Moore's Federal Practice, paragraph 0.410 [2] under the heading "Spli a Cause of Action," where the Restatement (Second) Judgements is cite listing the exceptions to the rule against splitting a cause of action. The of six exceptions includes the following:

> The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the restrictions on their authority to entertain multiple theories or demands for multiple relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or relief, ...

Cited as an example are "actions for violation of the federal anti-trust statu [which] may be brought only in the federal district courts. In su circumstances, the claim under federal law has sometimes been characteriz as a different cause of action [Moore prefers terming this the splitting of cl claim or cause of action under the exception noted above] and the effect a prior suit in the state court arising out of the same conduct and inju therefore limited to collateral estoppel." Moore's Federal Practice paragrap 0.410 [1] n. 10 p. 351.

That we have jurisdiction over the parties and the subject matter is withou question. That we have exercised such jurisdiction concurrent with the state court is also without question, since it is clear that complainant has at no point made any election of remedies in favor of the state forum. Indeed, complainant has instead clearly elected to proceed in the federal forum. That the state court judgement is *res judicata* and binding upon us is also clear. What is not at all clear is that our granting to complainant of a reparation award based on the same claim as that adjudicated in state court should in any sense be thought of as a failure to accord full faith and credit to the state court judgement or be construed as a failure to honor the *res judicata* effect of that judgement. The opposite is instead the effect of such an award, for in reality, we are but confirming to complainant the additional means of enforcement granted to him by Congress under the Act. To the extent that the state court judgement has heretofore been satisfied, the reparation aard herein shall also be deemed to be satisfied. On the basis of the adjudication by the Tennessee Chancery Court, we conclude that respondent herein has violated Section 2 of the Act and is liable to complainant for such violation in the amount of $139,917.11, with interest. A reparation order should be issued in complainant's favor for such amount. If respondent has already paid the judgement, it should notify the Secretary that it has done so, providing satisfactory proof of payment.

Order

Within 30 days from the date of this Order, respondent shall pay to ainant, as reparation, $139,917.11 with interest thereon at the rate of er annum from August 1, 1985, until paid.

pies of this Order shall be served upon the parties.

MAX FROSTEG, d/b/a THE BULL FROSTEG, CO. v. DADE TOMATO CO.
PACA Docket No. R-88-185.
Decision and Order issued February 27, 1989.

Inspections - by buyer at shipping point - Brokers - statements - Agency.

Where buyer's agent visually inspected tomatoes before purchase at shipping point, the warranty of suitable shipping condition was waived, and buyer bought produce without recourse. A broker's statement as to terms of sale is entitled to great weight.

George D. Becker, Presiding Officer.
Complainant, Pro se.
David V. Lococo, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

Preliminary Statement

This is a reparation proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et. seq.*). A timely complaint was filed on March 10, 1988, in which complainant alleged that respondent owed it $9,441.15 in connection with the sale and shipment of a truckload of tomatoes in interstate commerce. Respondent filed an answer in which it denied the material allegations of the complaint. Because the amount in controversy is less than $15,000.00, the shortened method of procedure provided in section 47.20 (7 C.F.R. § 47.20) of the Rules of Practice issued pursuant to the Act is applicable. Complainant, Max Frosteg, is an individual doing business as The Bull Frosteg Co., with an address in Pelham, Georgia. Respondent, Dade Tomato, Co., is a corporation located in Miami, Florida. At the time of the transaction involved in this proceeding, respondent was licensed under the Act.

Findings of Fact

1. On June 22, 1987, Mr. Rich Cohen of Seymour Cohen Brokerage Co., located in Miami, Florida, went to the place of business of complainant in Pelham, George, and negotiated with complainant for the purchase on behalf of respondent of a truckload of tomatoes. Rick Cohen looked at specific tomatoes on June 22, 1987, and determined that they were satisfactory to meet the needs of respondent.

2. Rick Cohen negotiated a contract price with complainant of $5.00 a carton for 1,671 cartons of tomatoes, plus $.15 for palletizing. Rick Cohen conveyed the results of his observation of the tomatoes to respondent, informing respondent that they would meet respondent's needs, although there appeared to be about 15% condition defects. Respondent accepted Rick Cohen's representation, and told him to enter the contract with complainant for $5.00 a carton plus $.15 palletizing, f.o.b.

3. On June 24, 1987, complainant shipped from Georgia to respondent in Florida, a truckload of tomatoes consisting of 815 cartons of those of a man known as Ansley, and 856 cartons of Bull Frosteg brand tomatoes. Rick Cohen was at complainant's place of business when the tomatoes were loaded and observed their condition. The tomatoes arrived in Miami, Florida, at respondent's place of business, on or about June 25, 1987, where they were received and accepted through the act of unloading.

4. Respondent subjected the tomatoes to a Federal inspection on June 25, 1987. It showed in pertinent part that they Ansley lot, consisting of 815

cartons, had 3% decay and 6% damage by sunken discolored areas, for a total of 9% condition defects. It also showed that the Bull Frosteg lot had 2% decay and 11% damage by sunken discolored areas for total condition defects of 13%. Therefore, the total condition defects for the entire load of tomatoes was approximately 11%, with less than 3% decay. The inspection also showed that the tomatoes were mostly, 90% or more, green or breakers.

5. Respondent subjected the load of tomatoes to another federal inspection on June 30, 1987. It showed in pertinent part that the Ansley lot had 12% decay and 10% sunken discolored areas. It showed that the Bull Frosteg tomatoes had 7% decay and 29% sunken discolored areas.

6. Respondent has paid complainant $2,974.75 with respect to this transaction, leaving $6,466.40 in dispute.

Discussion

This proceeding involves a question as to whether respondent was entitled to pay less than the contract price for a truckload of tomatoes because, five days after arrival, they showed a large percentage of condition defects. Based upon the record available to us, we conclude that respondent was not entitled to pay less than the full contract price for the tomatoes.

On June 22, 1987, respondent, through its agent, Rick Cohen of Seymour Cohen Brokerage Co., located in Miami, Florida, looked at tomatoes available at complainant's place of business in Pelham, Georgia. Rick Cohen advised respondent that the tomatoes would have up to 15% condition defects, and respondent advised Rick Cohen that it was all right to purchase them for respondent. It is a long standing principle that when a purchaser or its agent personally selects a commodity based upon visual inspection that the warranty of suitable shipping condition does not apply. See *L. T. Malone Co. v. Al Kaiser & Bros.*, 18 Agric. Dec. 12211 (1959). Thus, in this case, complainant's sale of the tomatoes inspected by respondent's agent on the premises of the shipper voided the warranty of suitable shipping condition. This becomes even more apparent when it is noted that on June 24, 1987, at the time the tomatoes were loaded aboard the truck for transportation to respondent, Rick Cohen again looked at them. He did not protest that they were not suitable for respondent's purposes.

We are also constrained to find in favor of complainant because this was a free on board contract. When there is a free on board contract, the act of unloading at respondent's place of business constitutes an act of acceptance of the tomatoes. Therefore, respondent had the burden to prove that the tomatoes were not in suitable shipping condition when shipped. *Thereon Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971). Respondent attempted to do so by means of a Federal inspection on June 25, 1987, which appears to be the date of its receipt of the tomatoes. That inspection showed that with respect to 815 of the 1,671 cartons of tomatoes, there were 9% condition defects, and that with respect to the other 856 cartons, there were 13% condition defects. This amounts to approximately 10% condition defects of which less than 3% was decay. Such percentages are well within the tolerances for 85% U.S. No. 1 tomatoes at destination. See 7 C.F.R. § 51.1861. Respondent endeavored to overcome this disability by a further federal inspection on June 30, 1987, which inspection showed an average of about 29% condition defects. It claimed that because the tomatoes were green on arrival, a federal inspection five days after receipt and acceptance could show that they did not make good delivery. However, it cited no authority for the proposition that a subsequent inspection would be accepted

as showing condition at the time of arrival, and we are not aware of any such authority either.

In view of the above, we have no alternative other than to find that respondent is liable to complainant for the full purchase price of the tomatoes. There remains for consideration, a disagreement as to what constituted the full purchase price. Complainant contended that it was entitled to $5.00 per carton for the tomatoes plus $.50 per carton for gassing and $.15 per carton for palletizing for a total contract price of $5.65 per carton or $9,441.15. Respondent contended that it would never pay for gassing for an overnight transport of tomatoes. The broker provided a memorandum of sale which did not show that there was gassing. A broker's statement, such as contained in a memorandum of sale, is entitled to great weight. *Homestead Tomato Packing Co. v. Mims Produce, Inc.*, 43 Agric. Dec. 173 (1984). Therefore, based upon a preponderance of the evidence, we find that there was no agreement for gassing the tomatoes. In view of this, we find that the total contract price of the tomatoes was $5.15 for 1,671 cartons of tomatoes or $8,605.65. Respondent has already paid complainant $2,974.75. This leaves $5,630.90 unpaid. Respondent's failure to pay complainant this amount is a violation of Section 2 of the Act for which reparation must be awarded with interest.

Order

Within 30 days from the date of this Order, respondent shall pay to complainant $5,630.90, with interest thereon at the rate of 13% per annum from August 1, 1987, until paid.

Copies of this Order shall be served upon the parties.

GEORGE S. ADAMS, d/b/a ADAMS FRUIT & IMPORTING v. CALIFORNIA WINE GRAPES CO., INC.
PACA Docket No. 2-7649.
Decision and Order issued February 28, 1989.

Broker - termination of duties - Standing - necessary to sue.

When broker's duties terminated upon formation of contract between seller and buyer, about proof it had interest in transaction, it lacked standing to sue for damages.

George D. Becker, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a reparation proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely formal complaint was filed on March 11, 1987, in which complainant alleged that respondent owed it $1,819.30 in connection with a transaction involving the sale and shipment of grapes in interstate commerce. Respondent filed an answer in which it denied the allegations of the complaint. Because the amount in controversy is less than $15,000.00, the shortened method of procedure provided in section 47.20 (7 C.F.R. § 47.20) of the Rules of Practice issued pursuant to the Act is applicable. Complainant, George S. Adams, is an individual doing business as Ada-

Fruit & Importing, and is located in Miami, Florida. Respondent, California Wine Grapes Co., Inc., is a corporation located in Detroit, Michigan. At the time of the transaction involved in this proceeding, respondent was operating subject to license under the Act.

This proceeding involves a transaction in which complainant alleges that a truckload of grapes was sold to respondent for shipment from California to respondent's place of business in Detroit, Michigan on October 9, 1986, for a total contract price of $9,699.30. Complainant further contends that the grapes while en route, were diverted by complainant to another buyer in New Jersey because respondent notified complainant it would not accept the grapes. Complainant contends that it received $8,780 from the customer in New Jersey, leaving $919.30 unpaid on the original contract price. In addition, complainant claimed it was entitled to $900.00 for mailgrams, telephone calls, additional freight, diversion charges and preparation of the pleadings in this procedure.

It is a long standing principle of contract law that a party must have a direct interest in the case in order to be allowed to file a pleading. Based upon the documents in the official file of this case, it is clear that complainant was operating as a broker with respect to this transaction. It provided its "Standard Confirmation of Sale" No. 86174 dated october 9, 1986, which showed that the grapes were sold for the account of Frank Evangelho, Danville, California. The purchaser was stated to be California Wine Grapes, located in Detroit, Michigan. Furthermore, complainant shows by a letter dated January 22, 1987, to Mr. George Hartfelder, of the United States Department of Agriculture that "I purchased no grapes from any shipper, all grapes are sold for the account of grower, shipper." Pursuant to 7 C.F.R. § 46.28 (b) "Unless otherwise specifically agreed, the broker does not guarantee the performance of the contracting parties and is entitled to receive prompt payment of the brokerage fee whenever a valid and binding contract is negotiated." It has also long been held that a broker's duties usually terminate when a binding contract has been entered. *Gonzales Packing v. Price*, 25 Agric. Dec. 390 (1966). Although complainant continued to deal with respect to the grapes after they were sold to respondent, there is nothing in this record to indicate that complainant was the principal in this transaction. Rather, the record indicates that the principal was the shipper, Frank Evangelho. Under such circumstances, we have no alternatives other than to conclude that complainant has no standing to bring this action to collect money from respondent with respect to the alleged failure to pay because of a breach of contract. *Arid Zone Farms v. Chas. P. Tatt Fruit Co.*, 18 Agric. Dec. 1181 (1959); *Food Sales Co. v. Smeltzer Orchard Co.*, 18 Agric. Dec. 1209 (1959).

If we were to consider this matter on the merits, we would, in any event, find in favor of the respondent. Complainant has alleged one factual situation with respect to the terms of the contract. Respondent has alleged another factual situation, denying that it purchased the grapes, but rather stating that they were to be delivered on consignment. As the proponent of a breach of contract, complainant has the burden to show that such breach occurred. *Hol-Mex Corporation v. DiMare Brothers*, 19 Agric. Dec. 1187 (1960). When, as here, the offsetting statements of the two parties are given exactly weight, we must find that complainant has failed to sustain that burden of proof.

In view of the above, the complaint in this proceeding must be dismissed.

Order

The complaint in this proceeding is dismissed.
Copies of this Order shall be served upon the parties.

U.S.A. FRUIT, INC. v. ROXY PRODUCE WHOLESALERS, INC.
PACA Docket No. R-88-78.
Decision and Order Issued February 28, 1989.

Burden of Proof - on party that claims change in contract - Inspections - not valid when performed long after arrival - Pleadings - effect of unsworn answer.

Respondent failed to meet its burden to show complainant had agreed to a modification in the terms of the contract. A federal inspection of plums held 4 days after arrival showed a high percentage of condition defects. Held: Since the defects were progressive, the inspection could not be said to show the plums' condition on arrival.

George D. Becker, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

Preliminary Statement

This is a reparation proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act of 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely formal complaint was filed on October 7, 1987, in which complainant alleged that respondent owed it $7,712.00 in connection with the sale and shipment of a partial truckload of plums in interstate commerce. Respondent filed an answer in which it denied the material allegations of the complaint. Because the amount in controversy is less than $15,000.00, the shortened method of procedure provided in section 47.20 (7 C.F.R. § 47.20) of the Rules of Practice issued pursuant to the Act is applicable. Complainant, U.S.A. Fruit, Inc., is a corporation located in New York, New York. Respondent, Roxy Produce Wholesalers, Inc., is a corporation located in the Bronx, New York. At the time of the transaction involved in this proceeding, respondent was operating subject to license under the Act.

Findings of Fact

1. On January 25, 1987, complainant sold to respondent 136 cases of size 96 plums at $12.00 a case, 240 cases of size 102 plums at $9.50 a case, and 400 cases of size 110-120 plums at $9.50 a case, for a total of 776 cases and a total contract price of $7,712.00 for the plums, delivered. The plums were shipped from Pennsylvania on that date to respondent at New York City, where they were received and accepted on January 25, 1987.

2. Respondent subjected the plums to a federal inspection on January 29, 1987. It showed that the temperature of the plums was 43 to 45° F. It showed that 700 of the cases were inspected. It showed with respect to the Santa Rosa plums involved that there was 22% damage including 7% damage by brown skin discoloration with less than one half of one percent decay. With respect to what is known as the Linda Rosa Lot of plums, it showed that the condition defects were in tolerance and that there was no decay.

Santa Rosa plums were the size 102 and 110-120 plums and the Linda Rosa plums were the size 96 plums. Therefore, there were 136 cases of Linda Rosa plums which made good delivery and another 76 cases of plums which evidently were not inspected. 564 cases of Santa Rosa plums had 22% damage, including the 7% damage by brown skin discoloration.

3. Respondent handled the plums and provided an account of sales which showed a net return of $2,176.48.

4. No portion of the $7.,712.00 has been paid to complainant.

Discussion

This proceeding involves a dispute as to whether a partial truckload of plums made good delivery to respondent, or whether respondent was otherwise entitled to handle the plums for the account of the complainant. Respondent has raised two contentions as to why it was entitled to handle the plums for the account of complainant. In the first instance, it claimed that the plums did not make good delivery, as reflected by a federal inspection made four days after arrival. In the second instance, it claims that the salesman of complainant, Robert D' Annucci, authorized respondent to sell the plums for complainant's account when notified at the time of arrival that there were condition defects. Having unloaded the plums, respondent received and accepted them. Therefore, it has the burden to prove that the plums did not make good delivery, and that it suffered damages. *Thereon Hooker Co. v. Ben Gatz Co.,* 30 Agric. Dec. 1109, 1112 (1971). Alternatively, as the proponent of a cootractual change, it bas the burden to show that there was a modificatioo to the contract under which it was permitted to handle the plums for the account of the complainant. *R. D. McGinnis Produce v. Pinders Produce Co.,* 28 Agric. Dec. 249 (1969).

With respect to the condition of the plums on arrival, we find that a federal inspection held four days after arrival of 700 out of 776 cases of plums, which inspection found 136 of the cases were in excellent condition, and showed 22% condition defects with 7% serious condition defects for 564 cases, cannot be said to be indicative of the condition of the plums on arrival. It has long been held that Federal inspections beld a substantial length of time after arrival may not he indicative of the condition of the commodity on arrival. *D. L. Piazza Co. v. Stacy Distributing Co.,* 18 Agric. Dec. 307 (1959). Here, where 15% of the condition defects are not specified, we cannot say that they were not progressive defects that could have increased considerably over a four day period of time. With respect to brown skin discoloration, that is considered to be serious damage of which there may not be more thun 4% for U.S. Combination plums at destination. See 7 C.F.R. § 51.1525 (b). Because there is oo indication as to grade on the invoice or in the pleadings of the parties, we conclude that this was a No Grade contract, and U.S. Combination plums is the lowest grade available. We cannot say that plums which showed 7% brown skin discoloration four days after arrival would not have shown 4% or less such discoloration on arrival. We are particularly concerned in this regard because the temperature of the plums, at the time of inspection was 43 to 45° F., which is sufficiently high for the plums to ripen. See "The Commercial Storage of Fruits, Vegetables, and Florist and Nursery Stocks," Agriculture Handbook 66, USDA, page 49. In view of this, respondent cannot prevail insofar as its contention tbat the plums did not make good delivery are concerned.

Respondent's alternative defense is that complainant's Sales Agent, Robert D'Annucci, autborized respondent to handle the plums for complainant's

account when he was notified on January 26, 1987, that there were condition defects with respect thereto. Mr. D'Annucci filed a short statement in support of this position which was not sworn. Therefore, it has very limited evidentiary value in this proceeding. *See Frank W. Prillwitz, Jr. v. Sheehan Produce,* 19 Agric. Dec. 1213 (1960). Furthermore, respondent acknowledged in its Answer that Mr. D'Annucci had been fired for reasons unknown by respondent. This is an admission that Mr. D'Annucci had reason to be biased against complainant. Based upon the very short and limited statement of Mr. D'Annucci, we find that it is not substantial enough to warrant the conclusion that he did, indeed, authorize respondent to handle the plums for complainant's account.

Complainant also raised in its opening statement the fact that a check from respondent to complainant for $4,032.00 for the nectarines which were on the truck had been returned because of insufficient funds. Complainant requested an award for this amount as well. It was too late for complainant to make such a request at the time it filed its opening statement. Therefore, that request is summarily denied.

In view of the above, we find that respondent has failed to pay complainant $7,712.00. It's failure to do so is a violation of Section 2 of the Act for which reparation must be awarded with interest thereon at the rate of 13% per annum from March 1, 1987, until paid.

Order

Within 20 days from the date of this Order, respondent shall pay the complainant $7,712.00, with interest thereon at the rate of 13% per annum from March 1, 1987, until paid.

Copies of this Order shall be served upon the parties.

MOUNTAIN TOMATOES, INC. v. E. PATAPANIAN & SON, INC.
PACA Docket No. 2-7631.
Decision and Order issued March 23, 1989.

Damages - Attorney's Fees.

Where tomatoes did not make good delivery, respondent was entitled to damages based on market value as reflected in Market News Reports. Attorney's fees were awarded to respondent based on presiding officer's appraisal of the worth of the services rendered, as well as other factors showing actual costs incurred.

Edward M. Silverstein, Presiding Officer.
Boyd B. Massagee, Jr., for Complainant.
Stephen P. McCarron, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

Preliminary Statement

This is a reparation proceeding
Commodities Act, 1930, as amende
complaint was filed in which the
respondent, in the amount of $37,96(
of tomatoes, a perishable agricultura
commerce.

Each party was served with a copy of the Department's report of investigation. Also, the respondent was served with a copy of the formal complaint, and filed an answer thereto in which it denied any further obligation to the complainant with respect to the subject transaction. In addition, respondent filed a counterclaim against complainant seeking payment of $50,000.00 in unspecified damages in connection with the same transactions as were made the subject of the complaint.

As the amount in dispute exceeded $15,000.00, and an oral hearing was requested, such a hearing was held on August 16, 1988, before Presiding Officer Edward M. Silverstein in Boston, Massachusetts. Complainant was represented by Boyd B. Massagee, Jr., Esq. Hendersonville, North Carolina, and respondent was represented by Stephen P. McCarron, Esq., Silver Spring, Maryland. Two witnesses appeared on behalf of each party. Also, each party filed a brief.

Findings of Fact

1. Complainant, Mountain Tomatoes, Inc., is a corporation whose mailing address is P.O. Drawer 220, Hendersonville, North Carolina 28793. At all material times, complainant was licensed under the Act.

2. Respondent, E. Patapanian & Son, Inc., is a corporation whose mailing address is P.O. Box 23, Belmont, Massachusetts 02178. At all material times, respondent was licensed subject to the Act.

3. Virtually all of the tomatoes in the four subject lots shipped to respondent by complainant, which are more specifically discussed below, were grown by Mr. Robert M. McLain ("McLain"), Horseshoe, North Carolina.

4. Ms. Sandra Linton ("Linton"),[1] the principal in a produce brokerage company called Sparks Brokerage, P.O. Box 1271, Bonita Springs, Florida 33923, during September 1986, was contacted by an employee of complainant, Mr. Tom Smyth ("Smyth"), while she was working in Pennsylvania, and asked to come to North Carolina to help complainant market tomatoes. From North Carolina, Linto contacted several of her former customers, including respondent, and offered to broker purchases of tomatoes from complainant for them. On or about September 23, 1986, at around 9:30 a.m. Linton noted that McClain's picking crew were already picking tomatoes in the field. Knowing that, because the tomatoes were still wet, they could be damaged by such activity, Linton asked Smyth to have McClain cease such harvesting. During the afternoons when the four lots of tomatoes in question were being packed by complainant, Linton observed the activity and the tomatoes. She was "looking for grade and quality, and did not notice any defects. However, she did notice that the water in the dump (*i.e.*, where the bins of tomatoes were dumped after being brought in from the field) was not clean and that the rollers on the graders were not being cleaned on a periodic basis. After the tomatoes were sized, graded and boxed, Linton looked them over and observed that they were green. She did not observe any defects.

5. On or about September 22, 1986, complainant sold 1600 cartons of 6x7 tomatoes to respondent at an agreed f.o.b. price of $3.50 per carton ($5,600.00) plus a 15¢ per carton pallet charge ($240.00) for a total agreed f.o.b. price of $5,840.00. Subsequent thereto, complainant issued its invoice No. 10180. The broker on the transaction was Linton, who issued a brokers

---

[1]Her full name is Sandra Spark Sage Linton. In the record of the proceeding, she is often referred to as Ms. Sage.

memorandum accurately reflecting the parties' agreed terms of sale. She was paid 15¢ per carton ($240.00) by respondent. This lot of tomatoes was inspected at shipping poiot on September 22, 1986. On the certificate issued thereafter, No. B-03841, the grade was reported as being "US Comb. avg. approx. 85% US No. 1 quality mature green," and its condition is reported as: "Generally mature, well Developed [sic]. Clean. Fairly well to well shaped. Fairly smooth to smooth. Grade defects average within Tolerance. No Decay." After receipt and acceptance by respondent on September 24, 1986, and after being treated in respondent's greening room, the tomatoes were the subject of a Federal inspection on October 3, 1986. On the certificate issued thereafter, N. C-025231, the temperature of tomatoes was reported as being "68 to 69° F," and the Quality and Condition is reported as follows:

> Grade defects average 6% chiefly misshapen, and scars. Average approximately 30% green to Breakers. 35% turning to pink. 30% light red to red. Average 4% decay. 10 to 48% average 27% damage including 4% serious damage by sunken brown pitted areas.

The grade of the tomatoes is reported as follows: "Mects quality requirements but fails to grade U.S. No. 1 only account condition."

6. On or about September 24, 1986, complainant sold three truckloads of tomatoes to respondent. The first truckload consisted of 1,520 cartons of 6x7 tomatoes sold at an agreed f.o.b. price of $4,50 per carton ($6,840.00) plus a 15¢ per carton pallet charge ($228.00) for a total agreed f.o.b. price of $7,068.00.[2] Subsequent thereto, complainant issued its invoice No. 10196. The broker on the transaction was Linton, who issued a brokers memorandum accurately reflecting the parties' agreed terms of sale. She was paid 15¢ per carton ($228.00) by respondent for brokerage. This lot of tomatoes was the subject of a shipping point inspection oo September 23-4, 1986. On the certificate issued hereafter, No. B-03847, the grade was reported as being "US Comb. avg. approx. 85% US No. 1 quality mature green," and its condition is reported as: "Generally mature, well Developed [sic]. Clean. Fairly well to well shaped. Fairly smooth to smooth. Grade defects average within Tolerance. No Decay." On September 30, 1986, after being received and accepted by respondent, and after being treated in respondent's greening room, these tomatoes were the subject of a Federal inspection. On the certificate issued thereafter, No. C-025113, the temperature of the tomatoes was noted as being "70 to 74° F., and the condition was reported as follows:

> Grade defects average 3%, scars and catfaces. Average approximately 85% green and breakers, 10% turning to pink, and 5% light red to red color. Average 1% decay. Average 7% damage by sunkeo discolored areas over the shoulders. From 6 to 22% average 13% damage by numerous pitted areas, including 4% serious damage.

The grade of the tomatoes is reported as follows: "mects quality requirements, but fails to grade U.S. No. 1, only account of condition." On

---

[2]The original price of seven of these cartons was $8.50 pr carton ($59.50), and the original price of 1353 of these cartons was $7.00 per carton ($9,471.00). This made the original total agreed f.o.b. price $10.478.50. Complainant made the reduction in price in between the filing of the informal complaint and the filing of the formal complaint. *See* Hearing Transcript, page 13.

October 3, 1986, this lot of tomatoes was, again, the subject of a Federal inspection. It was noted, on the certificate issued thereafter (No. C-025232), that the temperature of tbe tomatoes was "68 to 69° F." The condition of tlic tomatoes was noted as follows:

> Grade defects average 3% misshapen. Avcrage approximately 65% Green to Breakers, 20% Turning to Pink, 15% Light Red to Red. Avcrage 20% decay. 60 to 85%, Average 69% damage, including 13% SERIOUS [sic] damage by sunken brown pitted areas.

Tbe grade of tbe tomatoes was noted as follows: "Meets Quality Requirements but fails to grade U.S. No. 1 only account condition."

7. Tbe second truckload of tomatoes which respondent purchased from complainant on September 24, 1986, consisted of 1,200 cartons of 5x6 tomatoes sold at $8.50 per carton ($10,200.00), 400 cartons of 6x6 tomatoes sold at $7.00 per carton ($2,800.00), and 80 cartons of 6x7 tomatoes sold at $4.50 per carton ($360.00), plus a 15¢ per carton pallet charge ($252.00), for a total agreed f.o.b. contract price of $13,612.00. Subsequently, complainant issued invoice No. 10197. The broker on the transaction was Linton, who issued a brokers memorandum accurately reflecting the parties' agreed terms of sale. She was paid 15¢ per carton ($252.00) by respondent for brokerage. This lot of tomatoes was the subject of a shipping point inspection on September 23-4 1986. On the certificate issued thereafter, No. B-03847, tlie grade was reported as being "US Comb. avg. approx. 85% US No. 1 quality mature greeo," and its condition is reported as: "Generally mature, well Devclopcd [sic]. Clean. Fairly well to well shaped. Fairly smooth to smooth. Grade defects average within Tolerance. No. Decay." After being received and acccpted by respoodent, and after being treated in respondent's greening room, on September 26, 1986, the tomatoes were the subject of a Federal inspectioo. Oo the certificate issued thereafter, No. 025126, tlie temperature of the tomatoes was reported as being "62 to 76° F.," and the condition of the tomatoes is reported as follows:

> Grade defects average 9% catfaces, scars, baeterial spot, and baeterial speck. Average approximately 98% green and breakers. Damage by numerous brown speckled areas ranges in most samples 2 to 7% some none average 4%. Average 2% damage by sunken discolored areas. Less tban 1% decay.

The Grade of thc tomatoes is reported as follows: "Meets quality requirements but fails to grade US No. 1 only account condition." Oii September 30, 1986, the tomatoes were again the subject of a Federal inspection. On the certificate issued thereafter, No. C-025114, tlie temperature of the tomatoes was reported as being "64 to 68° F.," and tlie coodition of the tomatoes was reported as follows:

> Grade defects average 2%, scars. Average approximately 30% green and breakers, 35% turning to pink, and 35% light red to red color. Less tban 1% decay. From 8 to 18% average 13% damage by sunken discolorcd areas over the shoulders. From 6 to 20% average 14% damage by numerous pitted areas, including 3% serious damage.

The Grade of the tomatoes is reported as follows: "Meets quality requirements, but fails to grade US No. 1 only account of condition." On

October 3, 1986, these tomatoes were the subject of a Federal inspection while still at respondent's business location. On the certificate issued thereafter, No. C-025230, the temperature of the tomatoes is reported as being "67 to 69° F.," and the Quality and Condition of the tomatoes is reported as follows:

> Grade defects average 6% chiefly misshapen, growth cracks and scars. Average approximately 30% green to breakers, 40% turning to pink, 30% light red to red. Average 2% decay. 38 to 60% average 47% damage including 11% serious damage by sunken brown pitted areas.

The grade of the tomatoes is reported as follows: "Meets quality requirements but fails to grade U.S. No. 1 only account condition."

8. The third truckload of tomatoes which complainant sold to respondent on September 24, 1986, consisted of 1,600 cartons of 6x6 tomatoes sold at $7.00 per carton ($11,200.00) plus a pallet charge of 15¢ per carton for a total agreed f.o.b. price of $11,4000.00. Subsequently, complainant issued its invoice No. 10198. The broker on the transaction was Linton. She received 15¢ per carton ($240.00) from respondent for brokerage. During the period September 23-4, 1986, this lot of tomatoes was the subject of a shipping point inspection. On the certificate issued thereafter, No. B-03848, the grade of the tomatoes was reported as follows: "US Comb avg approx 85% US No 1 quality mature Green." The quality and condition of the tomatoes was reported as follows: "Generally mature, Well Developed. Clean, Fairly well to well shaped. Fairly smooth to smooth. Grade defects average within tolerance. No Decay." On September 26, 1986, after receipt and acceptance by respondent, this lot of tomatoes was the subject of a Federal inspection. It was noted, on the inspection certificate issued thereafter (No. 025125), that the temperature of the tomatoes was "64 to 73° F.," and that the condition was as follows: "Grade defects within tolerance. Average approximately 100% green and breakers. Less than 1/2 of 1% decay. Average 3% damage by numerous brown speckled areas." The grade was reported as "U.S. No. 1." These tomatoes, again, were the subject of a Federal inspection on September 30, 1986. On the certificate issued thereafter, C-025115, the temperature of the tomatoes was noted as "66 to 71° F.," and the condition of the tomatoes was reported as:

> Grade defects average 2%, scars. Average approximately 70% green and breakers, 15% turning to pink, and 15% light red to red color. Average less than 1% decay. Average 8% damage by sunken discolored areas over the shoulders. From 8 to 35%, average 19% damage by numerous pitted areas, including 6% serious damage.

The grade of the tomatoes is reported as "Meets quality requirements, but fails to grade US No 1 only account of condition." Again, on October 3, 1986, this lot of tomatoes was the subject of a federal inspection. On the certificate issued thereafter, No. C-05229, the temperature of the tomatoes is reported as "67 to 68° F.," and the condition of the tomatoes is reported as follows:

> Grade defects average 6% chiefly misshapen growth cracks and catfaces. Average approximately 40% green to breakers, 30% turning to pink, 30% light red to red. Average 2% decay. 34 to 74% average 53% damage including 9% serious damage by sunken brown pitted areas.

9. Oo October 17, 1986, a total of 3,357 cartons of tomatoes were the suhject of a Federal inspection at respondent's location. The condition of the tomatoes was reported, on the certificate issued thereafter (No. C-025502), as follows: "Product is soft, pitted and/or decayed with many yellow striped fruit." Io the Remarks section of the certificate, the inspector noted as follows: "Applicant states above product to be dumped."

10. On or ahout Octoher 8, 1986, respondeot sold 160 cartons of tomatoes rclated to invoice No. 10180 to M & M Fruit and Vegetable ("M & M"), 101 Reserve Road, Hartford, Connecticut 06114, for $2.50 per carton, or a total of $400.00. Respondent dumped the remainder of this lot, or 1,440 cartons. Freight on this transactioo was $1,565.00, and was paid by respondeot.

11. Respondeot dumped all of the tomatoes (1,520 cartons) purchased uoder complainant's invoice No. 10196. Freight on this transaction was $1485.00 and was paid by respondent.

12. Respoodent dumped all of the tomatoes (1,680 cartons) purchased under complainant's invoice No. 10197. Freight on this transaction was $1,645.00, and was paid by respoodent.

13. Duriog the regrading of the four lots of tomatoes, 1,843 cartons were lost through dumping of damaged tomatoes.

14. With respect to the tomatoes covered by complainant's invoice No. 10198, on or about October 10, 1986, respondent sold 400 cartons of the tomatoes to M & M for $2.00 per carton, or a total of $800.00. During the period October 14, through October 20, 1986, it sold 480 cartons of the tomatoes to M & M for $2.50 per carton, or a total of $1,200.00. On October 21, 1986, respondent sold 160 cartons of these tomatoes to D & D Produce, 105 Broadway, Malden, Massachusetts 02148, for $1.00 per carton, or a total of $160.00. Respondent claims that it dumped the remainder of this load (560 cartons). Freight on this transaction was $1,565.00 and was paid by respondent.

15. The Fruit and Vegetable Market News report for the Boston market for September 29, 1986, the day the first load of tomatoes could most probably have been ready for market reports that the price for 6x7 tomatoes was, approximately, $6.50 per carton. The Market News report for October 1, 1986, the day the last three loads of tomatoes could most probably have been ready for market, reports that the price for 5x6 tomatoes on the Boston market was, approximately, $11.00, that the price for 6x6 tomatoes was, approximately, $10.00, and that the price for 6x7 tomatoes was approximately, $7.50.

16. On or about October 3, 1986, at respondent's expense, Linton traveled from North Carolina to Massachusetts to view the condition of the tomatoes. Respondent's expense for this trip was $569.08.

17. The formal complaiot was filed on April 10, 1987, which was within nine months after the cause of actioo accrued.

Conclusion

There is no dispute that the respondeot received and accepted the four subject truckloads of tomatoes. Having accepted them, respondent became liahle for the full purchase prices upon which the parties had agreed less any provable damages resulting from a breach of contract committed by complainant. The burden of proving such a breach and such damages by a preponderance of the evidence is on respondent. *Sunny Ridge Farms v. Edward Dilatush & Co.*, 30 Agric. Dec. 961 (1971).

Respondent alleges that the complainant breached their contract by shipping inherently damaged tomatoes. In support, it offered numerous Federal inspection certificates all of which reflected that the most significant damage to the tomatoes was caused by numerous pitted, discolored, and/or sunken areas. The evidence in the record, including the testimony of complainant's own witnesses, establishes that such damage can only be caused in the field or by poor handling when the tomatoes are picked and packed before shipping.[3] Consequently, we must conclude that the respondent has satisfied its burden of proving that the complainant breached their contract by shipping damaged tomatoes.[4]

Having decided that the complainant breached the parties' contract, we must now decide on the amount of respondent's claimed damages. The measure of damages where a shipper has breached the parties' contract is the difference at the time and place of delivery between the value of the goods delivered and the value the goods would have had if they had been as warranted together with incidental damages. U.C.C. § 2-714; *Ritepak Produce v. Green Grove Markets*, 29 Agric. Dec. 165 (1970). We may accept the Market News prices for the various sizes of tomatoes on the appropriate days as the value which the tomatoes would have had on the day in which they should have been available for sale.[5] Consequently, we hold that the value of the tomatoes, had they been as warranted, was $45,200.00 (1,600 x $6.50 ($10,400.00)[6] + 1,200 x $11.00 ($13,200.00) + 2,000 x $10.00 ($20,000.00) + 1,600 x $7.50 ($12,000.00)[7]).[8] The only evidence as the value of the tomatoes

---

[3]It also was made clear that such damage would not show while the tomatoes were green but would show up when the tomatoes began to mature. Thus, the damage was not apparent when Ms. Linton viewed the tomatoes before shipment, but was apparent after the respondent treated them in its greening rooms.

[4]On brief, complainant claims that the tomatoes were purchased after inspection and that, therefore, its warranty of suitable shipping condition does not apply. However, we cannot conclude, based on the record which reflects that Linton was invited by complainant's employee (Smyth) to come to North Carolina to help complainant market tomatoes, that Linton was respondent's agent. It is only such a relationship which would allow us to conclude that the tomatoes were purchased after inspection. *Cf. Kantro v. Louis Zwick & Son*, 19 Agric. Dec. 779 (1960), where the broker clearly acted as an agent of the buyer.

[5]Ordinarily, we would look at the Market New price on the date the goods were received. However, we recognize that receivers must treat green tomatoes before they are salable. Therefore, we will use a date five days after delivery to allow for this treatment. Respondent argues that we should use the October 6, 1986, Market News report to establish the value of the tomatoes. However, although that report does contain North Carolina tomato prices, while the earlier Market News reports do not, we think that two weeks is an unreasonably long time to hypothesize the tomatoes being kept in the respondent's greening rooms. The earlier Market News reports do contain sufficient information for us to determine what the market prices would have been for these tomatoes when they should have been available for sale.

actually received is the proceeds from the respondent's resale of them, or a total of $2,560.00. Without any evidence that these sales, under the circumstances, were not prompt or proper or that more of the tomatoes than were sold by respondent were salable, we accept this amount as the value of the tomatoes actually received. *See Anthony Farms v. Empire Foods*, 33 Agric. Dec. 716 (1974). Therefore, we conclude that respondent suffered damages in the amount of $42,640.00, or $45,200.00 less $2,560.00.[9]

In its counterclaim, the respondent sought $50,000.00; at the hearing, respondent did not even attempt to prove that it was entitled to more than $32,722.00. Based on the record, we hold that respondent is only entitled to the amount of $4,680.00 on its counterclaim, or its damages of $42,640.00 less the agreed contract price of $37,960.00. Complainant's failure to pay respondent this amount is a violation of Section 2 of the Act for which reparation plus interest should be awarded.

Pursuant to Section 7(a) of the Act, 7 U.S.C. § 499g(a), respondent has claimed fees and expenses of $12,748.18. This total amount consists of attorney's fees of $11,440.20,[10] the cost of the hearing transcript ($250.00), fees and cost related to the depositions of $664.52, fees for service of subpoenas ($18.00), and miscellaneous fees and expenses of $375.46. Respondent has objected to the amount of this claim ($4,899.28) which is related to the depositions which respondent took, but which were not introduced or used at the hearing.[11] In response to that objection, respondent states: "The taking of depositions in this case was legitimate discovery device. *** There is no basis for complainant's allegation that the depositions were not used."

Our consideration of the specific issues related to respondent's claim must be prefaced by a discussion of Section 7(a) of the Act and a discussion of preliminary procedures which occurred in this matter. Section 7(a) of the Act provides, in pertinent part, as follows:

> The Secretary shall order any commission merchant, dealer or broker who is the losing party to pay the prevailing party, as reparation or

---

[8](...continued)

[8]Respondent also has claimed the brokerage which it paid Ms. Linton ($960.00) and its freight ($6,260.00) as consequential damages. However, those amounts are included in the Market News prices, and therefore to include them as consequential damages would be redundant.

[9]Respondent also claims damages of $450.00 which it paid for the Federal inspections. However, such expense, which was part of respondent's effort to accumulate evidence that complainant had breached the parties' contract, is not allowable. *Hilvert v. California Produce*, 24 Agric. Dec. 1001 (1965). For the same reason, respondent's payment of Ms. Linton's expenses ($569.08) on her trip to Boston to inspect the tomatoes is disallowed.

[10]Respondent claims 39.9 hours for preparation and appearance at the hearing at $150.00 per hour ($5,985.00) and 26.8 hours for preparation and appearance at depositions it requested at $150.00 per hour ($4,020.00) plus expenses of $879.28 in connection with the depositions and $555.92 in connection with the hearing.

[11]Complainant merely directed its objection to the attorneys fees and expenses related to the deposition. However, the total amount involved in respondent's claim is the $4,899.28 claimed by counsel plus $956.82 for other fees and expenses (including a total of $36.00 for charges to serve the subpoenas which respondent claimed twice, *i.e.*, the actual charge appears to be

> additional reparation, reasonable fees and expenses incurred in connection with any such [oral] hearing.

The term "prevailing party" has been defined to be the party in whose favor judgment is entered whether or not the party has recovered its entire claim. *See Bill Offutt v. Berry*, 37 Agric. Dec. 1218 (1978). However, being the prevailing party merely gives the party the right to cross the threshold. It remains for the Secretary to determine what fees and expenses claimed are reasonable. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983). In that case, one brought pursuant to the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988), the Court stated that the "most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id* at 433. Hours which are not "reasonably expended" should be excluded. *Id* at 434. Further, the Court stated, *Id* at 440:

> We hold that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results achieved.

The Secretary's rulings in reparation proceedings under the Act are in accord with this decision. *See e.g. Patterson Produce Co. v. John Lowe Produce Co., Inc.*, 39 Agric. Dec. 1006 (1980); Potatoe Sales v. Perfection Produce, 38 Agric. Dec. 273 (1979); *D. M. Slaughter & Son v. Veg. Juices*, 37 Agric. Dec. 188 (1978); *Ashley v. Cyr Bros. Meat Packing Co.*, 36 Agric. Dec. 401 (1977); *Zoller Distributing v. Tom Lange Co.*, 36 Agric. Dec. 428 (1977). Moreover, we also have stated that expenses which are not incurred in connection with the oral hearing are not allowable. *Pinto Bros. v. F. J. Balestrieri Co.*, 38 Agric. Dec. 269 (1979). By this, we mean that expenses which would have been incurred in connection with the case if that case had been heard by shortened procedure may not be awarded under Section 7(a). *See Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243 (1977).

The last note we make as a preface to our consideration of respondent's claim for fees and expenses concerns the February 23, 1988, letter which the presiding officer sent to the parties. In that letter, after indicating that he had reviewed the record, the presiding officer indicated that he believed that this case ought to be settled by the parties without the necessity of a hearing. It is apparent, from the record, that *no* serious attempts were made to do so by either party. Further, it appears to us that, had the parties entered into serious negotiations, *i.e.*, had complainant looked seriously at the quality of the tomatoes it shipped and had respondent looked seriously at its generalized claim that it suffered $50,000.00 in damages resulting from complainant's alleged breach, this case could have been resolved without further proceedings.

With that discussion in mind, we now review the respondent's claim for fees and expenses in the instant case. Respondent has claimed $12,748.18.

Of that amount, $11,440.20 represents its claim for attorney's fees and expenses. Respondent's attorney has claimed 21.8 hours of preparation for the depositions (which were not introduced or referred to at the hearing) and 32.9 hours of preparation for the hearing. Based on the issues presented in this case, we believe this claim is excessive. Eight hours preparation for each, or a total of 16 hours at $150.00 per hour ($2,400.00), should have provided respondent's counsel more than sufficient time to prepare.

Respondent claimed that its attorney spent seven hours at the hearing, however, the hearing only lasted 5.4 hours. Accordingly, it will only be allowed $810.00 (5.4 x $150.00) for that appearance.

Respondent, also, claims that its counsel spent five hours attending deposition hearings. As transcripts from the depositions were not submitted to the Hearing Clerk by the court reporter, as required in the Hearing Clerk's instructions, and as the transcripts were not made part of the record, we have no way of verifying that this amount of time was spent at the depositions. Accordingly, because we believe that such claim is excessive, it is reduced by two hours, and respondent will only be allowed $450.00 (3 x $150.00) for that portion of its claim.

Respondent claims reimbursement for the expenses of two attorneys who attended the depositions. We cannot understand why, due to the rather uncomplicated issues involved here, it took two attorneys to attend the depositions. Accordingly, respondent's claim is reduced by $408.18, and it is only allowed $471.10 for this portion of its claim.

Respondent claims $555.92 reimbursement for its attorneys expenses while in attendance at the hearing. Of this amount $173.22 is claimed as the attorney's hotel expense, however, his room cost was only $127.25. The remainder of this $173.22 consists of telephone charges which may or may not be related to the oral hearing ($16.86) and which are, therefore, disallowed, and restaurant charges. Under General Service Administration guidelines, during August 1988, the room allowance for the Boston area was limited to $75.00 and the subsistence allowance was $33.00 per day, and respondent's reimbursement will be limited to that amount, or $141.00. The remainder of this portion of respondent's claim ($376.00) is allowed.

Respondent claims $375.46 as miscellaneous expenses. The only item on the list which we can reasonably conclude as being related to the oral hearing is the $9.00 fee for copies of the Market News reports which respondent introduced at the hearing. The remainder of this portion of the respondent's claim is disallowed.

The remaining portions of respondent's claim ($932.52) is allowed.

In view of the above, we conclude that respondent should be awarded further reparation in the amount of $5,589.62.

Order

JNIFRUTTI OF AMERICA, INC. v. WILLIAM ROSENSTEIN & SONS, CO.

PACA Docket No. 2-7475.
Decision and Order Issued March 28, 1989.

Accord and Satisfaction - Agency - Banks.

There was a bona fide dispute as to the amount respondent owed for grapes purchased from complainant, and respondent sent checks stating "Paid In Full" to a Post Office Box. The Box was a mail drop for a bank which received all payments as agent for complainant. The bank negotiated the checks. Such action was an accord and satisfaction of the indebtedness.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act of 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $2,875.00 in connection with the shipment of three loads of grapes received in foreign commerce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complaint.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Both parties filed briefs.

Findings of Fact

1. Complainant, Unifrutti of America, Inc., is a corporation whose address is 3460 North Delaware Avenue, Suite 302, Philadelphia, Pennsylvania.

2. Respondent, William Rosenstein & Sons, Co., is a corporation whose address is 950 North Keysor Avenue, Scranton, Pennsylvania. At the time of the transactions involved in this proceeding, respondent was licensed under the Act.

3. On or about April 4, 1986, complainant sold and shipped to respondent, at a fixed price, f.o.b. 480 lugs of Thompson seedless grades U.S. No. 1 Table, received by complainant from Chile. Respondent accepted the grapes on arrival and has paid complainant for such grapes in the amount of $7,008.00.

4. On or about April 14, 1986, complainant sold and shipped to respondent, at a fixed price, f.o.b., 475 lugs of Thompson seedless grapes., U.S. No. 1 Table, received by complainant from Chile. Respondent accepted the grapes on arrival and has paid complainant for such grapes in the amount of $10,106.00.

5. On or about April 14, 1986, complainant sold and shipped to respondent, at a fixed price, f.o.b., 960 lugs of Thompson seedless grapes, U.S. No. 1 Table, received by complainant from Chile. Respondent accepted the

grapes on arrival and has paid complainant for such grapes in the amount of $14,400.00.

6. Complainant invoiced respondent for the April 4 (Finding of Fact 3) shipment on April 14, in the total amount of $15.00 per lug, or $7,488.00 (including $200.00 for freight); for the April 14 (Finding of Fact 4) shipment on April 17 in the amount of $15.00 per lug or $7,125.00 for the gapes and $18.00 per box or $3,456.00 for the apples, or a total amount of $10,581.00; and for the remaining April 14 (Finding of Fact 5) shipment in the total amount of $17.00 per lug or $16,320.00.

7. Upon receipt of the invoices, respondent entered into a good faith dispute with complainant over the contract price and quality of the grapes. Respondent tendered complainant payment in the form of check in the total amount of $35,562.00 marked "PAID IN FULL" and accompanied by a computer printout showing the amount of the $35,562.00 applicable to each of four transactions. The first of these transactions is not in dispute in this proceeding and as shown on the printout to be paid in the amount of $4,048.00 which is the amount for which respondent was billed in regard to such transaction. The remaining transactions were shown on the computer printout to he paid as follows:

. . .	File 30907	$7,008.00
. . .	File 30945	$14,400.00
. . .	File 30945	$10,160.00

8. The check and computer printout were sent by respondent to the address state on complainant's invoices as follows:

REMITTANCE ADDRESS
UNIFRUTTI OF AMERICA
P.O. BOX 8068-544
PHILADELPHIA, PA 19177

The check was negotiated and subsequently paid by respondent's bank.

9. A formal complaint was filed on October 2, 1986, which was within nine months after tbe cause of action alleged berein accrued.

Conclusion

Complainant brings this action to recover the alleged balance due on its three invoices covering the sale of Thompson seedless grapes and Granny Smith apples to respondent. Respondent alleges that the April 4 shipment of Tbompson seedless grapes was sent pursuant to a firm contract calling for the delivery of 10 pallets of grapes, at $14.00 per lug and 10 pallets at $15.00 per lug, or a total of 20 pallets of grapes of 1,920 lugs. Respondent states that it was billed $1.00 per lug above the contract priee for 10 of the pallets (the grapes covered by Finding of Fact 3 and 4) and $2.00 per lug more than the contract price for the remaining 10 pallets (tbe grapes covered by Finding of Fact 5). Respondent has shown to our satisfaction that it complained vigorously to complainant by telephone after receiving the invoices, and informed complainant that it would be paying only the amounts which it alleged to have been originally agreed upon. Respondent further alleges that complainant's acceptance and negotiation of its check effectuated an accord and satisfaction.

Complainant disputes respondent's contentions as to the original contract price of the grapes and vigorously asserts that no accord and satisfaction was effectuated. Complainant alleges that tbe negotiation of the check did not accomplisb an accord and satisfaction because complainant was unaware of such negotiation. Specifically, complainant's contention is as follows:

> It is our policy and procedure that remittances together with copies of invoices and any other correspondence to be mailed to our Lock Box at First Pennsylvania Bank, where they are automatically deposited in our bank account. Tbis is tbe reason why tbeir check was deposited and cashed like any other check. Furthermore, the Lock Box number and address is indicated as the only mailing address on our invoices.

In our opinion, complainant's appointment of an agent to receive remittances and negotiate cbecks is no concern of respondent's. An accord and satisfaction is basically a settlement of a disputed transaction. It is accomplished by the acceptance of a conditional tender of payment in a lower amount than originally claimed. It is important to keep in mind that the tender is conditional. In other words, no tender of payment in the lower amount is intended unless the lower amount is accepted by the creditor as full payment of the disputed transaction. We will not lightly consent to unilateral obliteration by the creditor of the condition under which such a tender is made. If complainant here had shown that respondent knew that the conditional tender was going to a bank and would not be seen by anyone at complainant's firm familiar with the transaction, and that furthermore the bank's policy was to ignore words conditioning the tender of the check and negotiate such checks without conferring with its depositor, we would then have a different situation from that with which we are confronted in this proceeding, and one which might yield a different result, perhaps on grounds of lack of good faith on the part of respondent in attempting to effectuate a settlement. However, in this case, there is no showing that respondent even knew that the address to which the check was sent was complainant's bank.

A further reason put forward by complainant as to why its acceptance of respondent's payment should not be considered an accord and satisfaction concerns the failure of the computer printout to reference respondent's invoice numbers; as far as we can tell from this record, the file numbers referenced by the computer printout concern respondent's files, and such numbers were apparently unknown to complainant. However, the transaction to which the $4,048.00 amount was meant to apply would have been obvious to complainant due to the fact that sucb amount coordinated perfectly in amount with a previously billed shipment. The amounts delineated for the remaining three transactions are in two cases within $500.00 of the amounts billed. It is obvious to us that complainant immediately upon being confronted with the computer printout was aware of what transactions were being paid. This is demonstrated by a letter whicb complainant's general manager wrote to the Department on July 7, 1986. This letter states in relevant part as follows:

> The answer to his question as to why we cashed their check marked "Paid In Full;"
>
> A. As previously mentioned, all remittances go through our Lock Box for direct deposits. Their remittance was received and deposited 5/5/86.

B. We immediately telephoned the Wm. Rosenstein & Sons Co., tried to collect the full amount of our invoice. The Rosenstein Co. refused and we filed with you a claim on 5/13/86.

The claim filed on May 13, 1986, by complainant clearly delineates the three transactions with complainant's invoice numbers, the dates on which the invoices were mailed, the amounts stated on the invoice, the amounts paid respondent's check, and the balances claimed due as to each invoice. Obviously, complainant was able to decipher from the information accompanying the check exactly what items were being paid by such check.

We have considered the other matters raised in complainant's brief and have concluded after an examination of the applicable cases that both the law and the facts in this proceeding show that an accord and satisfaction was accomplished between the parties herein. *Southmost Vegetable Coop. v. M. & G. Tomatoe*, 28 Agric. Dec. 966 (1969). See also *Johnson & Allen v. Fernandez Bros.*, 27 Agric. Dec. 1127 (1968). The complaint should be dismissed.

Order

The complaint is dismissed.

Copies of this Order shall be served upon the parties.

BAKER PRODUCE, INC. v. BALL BROKERAGE CO., INC., and/or W. DEEMER CLASS & SON, INC.
PACA Docket No. R-88-19.
Order of Dismissal Issued March 30, 1989.

"Price Protected" - meaning - Broker's duties - Broker's authority - Contracts.

Where broker negotiated contract which had fair piece, and modified contract without seller's authority, buyer was liable for full contract price. Broker was also liable for unpaid amount because it had exceeded its authority. The term "Piece Protected" was construed to mean that the price of the goods would be protected against a decline in market price until arrival absent clear evidence to the contrary.

Complainant, Pro se.
Respondent, Pro se.
Order issued by Donald A. Campbell, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondents in the amount of $11,183.11 in connection with a transaction involving the shipment of potatoes in interstate commerce.

A copy of the formal complaint was served on respondents. By letter dated February 13, 1989, complainant notified the Department that a settlement had been reached. Complainant, in its letter of February 13, 1989, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this Order shall be served upon the parties.

TOY A. HYDER v. WILLIAM R. WILLIAMSON, d/b/a WILLIAMSON FARMS.

PACA Docket No. R-88-68.
Decision and Order Issued April 5, 1989.

Inspection prior to purchase.

Because respondent personally inspected the peaches at shipping point, and approved them for shipping, he waived the warranty of suitable shipping condition, and is liable for the full purchase price regardless of condition on arrival.

George D. Becker, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

Preliminary Statement

This is a reparation proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act of 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely informal complaint was filed on December 29, 1986, in which complainant alleged that respondent owed it $659.75 in connection with the sale and shipment of a partial truckload of peaches in interstate commerce. A formal complaint was filed on June 19, 1987. Respondent filed an answer in which it denied the allegations contained in the complaint. Because the amount in controversy is less than $15,000.00, the shortened method of procedure provided in section 47.20 (7 C.F.R. § 47.20) of the Rules of Practice issued pursuant to the Act is applicable. Complainant, Toy A. Hyder, is an individual located in Campobello, South Carolina. Respondent, William R. Williamson, is an individual doing business as Williamson Farms, located in Wilson, North Carolina. At the time of the transaction involved in this proceeding, respondent was licensed under the Act.

Findings of Fact

1. On August 22, 1986, complainant sold to respondent 150 packages of peaches, U.S. No. 1 Extra at $3.25 per package f.o.b. Respondent asked that complainant place the peaches on complainant's loading dock for pickup by one of respondent's trucks. Just prior to when the truck arrived, respondent asked complainant to hold the peaches for a second truck which he would send. When the first truck arrived, complainant told the trucker that he was not to pick up the peaches. At 9:00 p.m on August 22, 1986, Mr. Williamson personally arrived at complainant's place of business. He personally inspected the peaches and determined that they were satisfactory for his use. He asked that complainant sell him 203 packages instead of 150 packages at $3.25 per carton, f.o.b., for a total contract price of $659.75. Complainant agreed to do so.

2. On August 22, 1986, at 11:00 p.m., a truck owned by respondent picked up the 203 packages of peaches from the loading dock of complainant. On August 23, 1986, respondent telegraphed complainant to notify him the peaches upon reinspection were not in a condition which were acceptable to him, as a result of which he would reject them back to complainant. On the afternoon of August 23, 1986, a Saturday, another truck other than the one on which the peaches had originally been loaded, arrived at complainant's place of business. Complainant refused to accept the peaches.

3. As a result of complainant's refusal to accept the peaches, respondent had them shipped to their original destination in Jacksonville, Florida, where they subjected to a federal inspection on August 25, 1986. The inspection showed 26% condition defects, including 13% bruising and 13% bacterial soft rot. Respondent tendered a check to complainant for $101.50 through Thomas Produce Company, Hendersonville, North Carolina, on October 16, 1986. Complainant refused to accept the check.

Discussion

This proceeding involves a dispute between the parties as to whether respondent is liable for the full purchase price of the peaches, having determined shortly after loading them on his truck that they were not in good shipping condition. The record shows that when inspected three days after pick up, showed 26% condition defects, well in excess of tolerances. However, based upon our analysis of the factual circumstances, as set forth in the Findings of Fact, above, we find that complainant must prevail in this proceeding.

The record is clear, and not controverted by Mr. Williamson, that on the evening of August 22, 1986, he personally inspected the peaches which he wanted to buy from complainant. It is a long standing principle of law under the Perishable Agricultural Commodities Act that when a party personally observes a commodity, and selects the commodity for shipment, he can no longer complain that it was not in suitable shipping condition when sold. See *L. T Malone Co. v. Al Kaiser & Bros.*, 18 Agric. Dec. 1221 (1959). This rule is extremely important because it recognizes the responsibility of the party, or its agent, seeking to make a purchase to ascertain thoroughly whether the goods it purchased are what it wants. It is in actuality a peripheral aspect of the doctrine of *caveat emptor.*

In addition, we are not convinced, given the fact that the peaches were sold by complainant to respondent in August, because there is no proof as to whether there was refrigeration aboard the truck in which they were shipped to Jacksonville, Florida, for inspection three days later, that the peaches were not in suitable shipping condition when loaded, but deteriorated considerably over the three day period of time. Certainly, that the peaches were unloaded from the truck on which they were originally placed and reloaded on another truck could have resulted in serious bruising. Therefore, we cannot say that any of the peaches were bruised when loaded. While 13% decay three days after being sold is high, hot temperatures are notorious in the Southern United States in the month of August. We cannot say that the peaches, if they were basically near ripe at the time they were loaded could not have had as much as 13% decay appear over a three day period of time. In any event, according to the federal standards provided in 7 C.F.R. § 51.1211 (a), there may be 3% decay at destination for U.S. Extra No. 1 peaches. The extra 10% at destination with respect to the peaches involved in this proceeding is what we are concerned with insofar as three days in transit is concerned. Lacking any information as to transportation conditions during that three day period of time, we find that it is not unreasonable that there could have been as much as 13% decay.

In view of the above, we find that respondent's failure to pay complainant $659.75 is a violation of Section 2 of the Act for which reparation must be awarded with interest.

Order

Within 30 days from the date of this Order, respondent shall pay to complainant $659.75, with interest thereon at the rate of 13% per annum from October 1, 1986, until paid.

Copies of this Order shall be served on the parties.

PAYETTE VALLEY FRUIT, INC. v. GEM STATE SALES, INC.
PACA Docket No. 2-7618.
Decision and Order issued May 1, 1989.

Trust Fund - Duties of Sales Agent - Trust Fund - proof of ability to recover.

Respondent, Sales Agent for Complainant, with authority to invoice and collect from purchaser, did not file timely trust notices. Complainant claimed damages for breach of duty. It was held that respondent had breached its duty but that complainant could not recover because it had burden to show it would have received money from buyer if timely trust notices had been filed, but did not do so.

George D. Becker, Presiding Officer.
Complainant, Pro se.
H. Ronald Bjorkman, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely informal complaint was filed on July 31, 1986, in which complainant seeks an award of reparation against respondent in the amount of $1,987.00 in connection with the sale and shipment of twn mixed loads of produce in interstate commerce. A formal complaint was filed on June 26, 1987. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying the material allegations of the complaint. Since the amount claimed in the formal complaint does not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Complainant, Payette Valley Fruit, Inc., is a corporation located in Payette, Idaho. Respondent, Gem State Sales, Inc., is a corporation located in Emmett, Idaho. At the time of the transactions involved in this proceeding, respondent was licensed under the Act.

This proceeding involves two transactions, one which occurred on December 13, 1985, and the other which occurred on December 20, 1985, in which complainant sold produce to Leo's Produce Company located in San Antonio, Texas. The sale was made through respondent, which both parties agree acted as the Sales Agent for complainant. The parties also agree that Leo's did not pay complainant for the produce in the total amount of $1,987.00, according to complainant, and a total amount of $1,972.00 according to respondent. Both parties apparently agree that respondent carried out the following activities as a Sales Agent: selling, invoicing, collecting from the purchaser, and remitting to complainant. Both parties agree that Leo's owes complainant money. However, complainant has sued respondent because it claims that respondent had a duty pursuant to 7 C.F.R. § 46.46 (2) to protect complainant pursuant to the trust provisions of the Act (U.S.C. § 499 e (c)).

This is a case of first impression. The issue as to whether a shipper's agent is liable when it has not protected such shipper's interests with respect to sales to a non-paying buyer by filing trust fund notices on behalf of the shipper has not been considered by this tribunal previously. Pursuant to 7 C.F.R. § 46.46 (e)(2):

> Agent who sell perishable agricultural commodities on behalf of a principal are required to reserve the principal's rights as a trust beneficiary as set forth in § 46.2 (z), (aa) and paragraphs (d), (f), and (g) of this section. Any act or omission which is inconsistent with this responsibility, including failure to give timely notice of intent to preserve trust benefits, is unlawful and in violation of Section 2 of the Act, ...

There is no question but that respondent did not file trust notices with respect to the two transactions involved in this proceeding. It admits that it did not do so. It gave reasons for its not doing so, and raised as a defense that it had the right to exercise judgement for the benefit of complainant as to whether it was appropriate to file trust fund notices, and that because it is the agent of complainant, complainant is bound to accept its judgement. At this juncture, we are not going to consider whether there is any validity with respect to it because this case can be resolved more readily on another principle of law which allows us to ignore a defense of this nature.

The purpose of 7 C.F.R. § 46.46 (e)(2) was to assure that a shipper would have trust fund notices filed for its benefit by its agent. It was necessary to promulgate such a regulation because the seller could not know whether the buyer was making timely payment when it was not the direct recipient of such payment. Rather, the party which has access to such knowledge is its agent. Therefore, the onus is on such agent to file an appropriate trust fund notice to protect its principal. As set forth in the regulatory provisions, its failure to do so is unlawful, and a violation of Section 2 of the Act. Complainant contends that the failure of respondent to file such notices with respect to the two transactions in issue in this proceeding is sufficient to make respondent liable for the full sales prices involved. We do not agree under the factual circumstances involved in this case.

As the proponent that it is entitled to damages, complainant has the burden to show that it would have received damages had trust fund notices been filed., *W. W. Rodgers & Sons v. California Produce Distributors, Inc.*, 914, 919 (1975). Complainant has not sustain that burden. At this juncture, this tribunal believes that in order to prove that its agent is liable as a result of a failure to file a trust fund notice which it is obligated to file, the complainant must show that had the trust fund notice been filed, it would have been compensated. While there may be other ways in which complainant may provide such proof, the obvious way in which it may provide proof of this nature is to show that other trust fund notices were filed as a result of which other members of the produce industry received either a portion of the amount to which they were entitled or full payment. A failure to show by some type of proof that but for the failure of an agent to file a trust fund notice recovery would have been achieved necessarily must result in a finding for respondent. Complainant has provided no proof in this regard. As a result, the complaint in this proceeding must be dismissed.

Order

The complaint is dismissed.
Copies of this Order shall be served upon the parties.

PEREZ RANCHES, INC., d/b/a P.R.I. SALES CO. v. PAWEL DISTRIBUTING CO.
PACA Docket No. R-88-143.
Decision and Order issued May 24, 1989.

Unsigned verification attached to signed complaint.

Complainant forgot to sign verification which was attached to the signed complaint. It was held that such failure was inadvertent and that statements in complaint could be given evidentiary value.

George D. Becker, Presiding Officer.
Complainant, Pro se.
E. Leigh Larson, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a reparation proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely informal complaint was filed on June 5, 1987, in which complainant alleged that respondent owed it $2,595.60 in connection with the sale and shipment of a truckload of Serrano peppers in foreign commerce. A formal complaint was filed on January 9, 1988. Because the amount in controversy is less than $15,000.00, the shortened method of procedure provided in section 47.20 (7 C.F.R. § 47.20) of the Rules of Practice issued pursuant to the Act is applicable. Complainant, Perez Ranches, Inc., is a corporation doing business as P.R.I. Sales Co., and is located in Nogales, Arizona. Respondent, Pawel Distributing Co., is a corporation located in Nogales, Arizona. At the time of the transaction involved in this proceeding, respondent was licensed under the Act.

On April 6, 1987, complainant sold to respondent 168 crates of Serrano peppers from Mexico at $27.85 per crate for a total contract price of $4,678.80, f.o.b. Nogales, Arizona. The peppers were delivered on that date to respondent's dock, where they were received and accepted by respondent. Respondent then sent the peppers to its customer in Chicago, Illinois. They arrived in Chicago on a date which is unknown at La Hacienda Brands' place of business. The peppers were received and accepted by La Hacienda Brands. They were subjected to a federal inspection on April 13, 1987, which inspection showed 15% condition defects. After receiving $2,083.20 from La Hacienda Brands, respondent remitted that amount of money to complainant. Respondent contends that for two reasons that is all the money it owes complainant. First, it contends that the original contract price of $27.85 per crate was reduced by complainant of $20.65 per crate because of market decline. Secondly, it contends that complainant granted La Hacienda Brands and respondent full protection when the federal inspection showed 15% condition defects.

Complainant claims in its complaint that it is entitled to the full contract price, leaving $2,595.60 unpaid. The complaint was signed by complainant's president, Mark Perez. The Rules of Practice also require a verification as to the truth of the allegations contained in a document submitted under the

shortened procedure (7 C.F.R. § 47.20 (b)). There was such a verification made, obstentibly by Mark Perez, in the complaint. It was notarized. However, Mark Perez did not sign the verification. Respondent contends that there are no facts which are of record because the verification was unsigned. We do not accept respondent's contention in this regard as accurate. We view the failure to sign and the verification as a technical oversight when the complaint is signed and the documents are attached to each other. Therefore, the mere failure to sign the verification apart from the signature on the complaint is not sufficient for us to say that the pleading has not been properly verified. In any event, whether it is properly verified or not, the result in this case will be the same based upon our findings taken from the uncontroverted evidence provided in the form of complainant's invoice, and respondent's statement with respect to how the transaction occurred.

There is no question but that respondent originally purchased 168 crates of Mexican peppers at $27.85 per crate for a total contract price of $4,678.80, f.o.b., Nogales Arizona. There is no question but that the peppers were delivered to respondent's dock where they were received and accepted. Respondent, in its own pleadings, admits this much. There also appears to be no question but that complainant granted respondent an adjustment in price because of a decline in the market. Complainant did not controvert respondent's statements in this regard. Therefore, we find that there was an adjustment in price from $27.85 per crate to $20.65 per crate granted to respondent on arrival of the peppers at respondent's place of business. We are further supported in our conclusion because respondent eventually sold the peppers to La Hacienda Brands at $26.65 per carton, which indicates it would not have sold such peppers at less than it had originally contracted to pay complainant.

However, we do not accept respondent's further contentions that after inspection in Chicago, complainant gave protection to both La Hacienda Brands and respondent with respect to the total price fetched, even though complainant did not, as it should have, controvert the allegations of respondent in this regard. We are drawn to our conclusion that such protection was not granted because it is illogical. In the first place, complainant had no obligation once the peppers had been sold to respondent to grant any further adjustments other than the adjustment in price it gave because of market decline. Therefore, an inspection taken seven days after sale by complainant to respondent does not bind complainant to provide protection since its warranty of suitable shipping condition ended on April 6, 1987, when the peppers reached their destination in Nogales, Arizona, at respondent's place of business. Of greater importance than the legal position of complainant in this regard is the fact that if complainant did grant protection as to price to respondent and its customer, respondent and its customer still have an obligation to provide an accounting of the total returns resulting from the sale of the peppers. The mere submission of a check without some further accounting is not adequate. Such payment is merely a conclusionary statement on the part of the parties as regards what they wish to pay to complainant. Therefore, having received and accepted the evidence, and having the burden to prove the damages suffered as a result of the condition of the peppers in Chicago, we find that respondent has not sustained that burden of proof. *Thereon Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109 (1971).

To compute the price which should have been paid by complainant, we take the adjusted price of $20.65 and multiply it by 168 crates, to reach a negotiated adjusted contract price of $3,469.10. From this must be deducted

$2.083.20 which has been paid, leaving $1,375.90 unpaid. Respondent's failure to pay complainant this amount is a violation of Section 2 of the Act for which reparation must be awarded with interest.

Order

Within 30 days from the date of this Order, respondent shall pay to complainant $1,375.90 with interest thereon at the rate of 13% per annum from May 1, 1987, until paid.

Copies of this Order shall be served upon the parties.

C & E ENTERPRISES, INC., a/t/a KOYAMA FARMS v. SANTA MARIA SALES, INC.

PACA Docket No. 2-7520.
Decision and Order issued May 24, 1989.

Jurisdiction - failure to honor payment agreement.

Complainant and respondent agreed that respondent would make monthly payments. Respondent failed to honor agreement, and complainant filed a formal complaint within 9 months of the date of the transaction. The Secretary took jurisdiction of the case.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $5,999.30 in connection with the shipment interstate commerce of a truckload of broccoli.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant and offering to pay complainant the reduced amount of $5,150.18. The record indicates that complainant agreed to accept payment in the reduced amount and that respondent paid complainant $1,150.18 and undertook to pay the balance due of $4,000.00 at a rate of $1,000.00 or more per month until paid. This undertaking was made on March 28, 1987. The record herein shows that at the time the submission of evidence in this proceeding was completed, September 23, 1987, respondent had paid complainant only $1,000 in addition to its original payment.

The amount claimed in the formal complaint does not exceed $1 and the shortened method of procedure provided in section 47.20 of t of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this proce verified pleadings of the parties are considered a part of the evider case, as is the Department's report of investigation. In addition, th were given an opportunity to file evidence in the form of sworn st Complainant filed an opening statement, in which it reasserted its the original entire invoice amount of $5,999.30. Respondent did n answering statement. Neither party filed a brief.

Findings of Fnct

1. Complainant, C & E Enterprises, Inc., is a corporation also trading as Koyama Farms, whose address is P.O. Box 728, Guadalupe, California.

2. Respondent, Santa Maria Sales, Inc., is a corporation wbosc address is P.O. Box 1298, Santa Maria, California. At thc time of thc transaction involved herein, rcspondent was licensed undcr the Act.

3. On or about May 6, 1986, complainant sold and shipped to respondent one truckload containing 1,008 cartons of size 14 bunchcd broccoli at $5.00 per container plus, $.85 per container for cooling, top ice at $80.00, and $22.50 for a Ryan temperature recorder, or a total of $5,999.30.

4. Following arrival of the broccoli at the place of business of rcspondent's customer, Finest Fruit Co., Inc., in Bronx, Ncw York, thc broccoli was federally inspected on May 14, 1986, at 7:10 a.m., aftcr bcing partly unloaded from the truck. Such inspection stated in relevant part as follows:

> CONDITION: Fresh mostly green color. Flower buds closed.
> 1 to 3 bunches per carton, average 17% damage
> by turning yellow bud clusters. No decay.

5. The formal complaint was filed on September 29, 1986, which was within nine months after thc cause of action berein accrucd.

Conclusion

The record hercin reflects that tbe undertaking to pay in a reduced amount was not honored by respondent, in that tbe required monthly payments were not all made. Consequently, we consider such undertaking to have been abrogated.

The time betwecn shipment, on May 6, 1986, and inspection, on May 14, 1986, was eight days. The broccoli exceeded our normal criteria for good delivery by only 2 percentage points. The time period during which the broccoli was in transit was clearly abnormal and consequently the warranty of suitable shipping condition is not applicable.

Respondent's customer accepted the truck shipment of broccoli and respondent is consequently liable to complainant for the full purchased price thereof, or $5,999.30, less the $2,150.18 already paid, or a balance of $3,849.12. Respondent's failure to pay complainant such amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

Order

Within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, $3,849.12, witb interest thereon at the rate of 13% per annum rom June 1, 1986, until paid.

Copies of this Order shall be served upon the parties.

G. TANAKA FARMS v. GARDEN STATE FARMS, INC.
PACA Docket No. 2-7490.
Decision and Order issued June 23, 1989.

Wrongful rejection - Effect of wrongful rejection on damages.

Where wrongful rejection was properly handled procedurally, and complainant accepted it, complainant is bound by its acceptance. However, complainant may still collect provable damages.

George S. Whitten, Presiding Officer.
Thomas R. Oliteri, for Complainant.
Respondent, Pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of $4,463.70 in connection with the shipment in interstate commerce of two trucklots of strawberries.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant as to the second transaction, admitting liability to the first transaction, and making payment therefor in the amount demanded by complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Complainant filed a brief.

Findings of Fact

1. Complainant is a partnership composed of George T. Tanaka, Chris C. Tanaka, Glenn T. Tanaka, and Shirley S. Tanaka, doing business as G. Tanaka Farms, whose address is 7152 Hazard Avenue, Westminister, California.

2. Respondent, Garden State Farms, Inc., is a corporation whose address is 3655 South Lawrence Street, Philadelphia, Pennsylvania. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about April 20, 1986, complainant sold to respondent one partial truckload of strawberries consisting of 576 flats of "George's Best" brand at $7.00 per flat, plus $.70 per carton for cooling, $.15 per carton brokerage, $114.00 for tectrol, and $22.50 for a Ryan temperature recorder, or a total invoice price of $4,658.10, f.o.b.

4. The strawberries were shipped by complainant from loading point in California on April 20, 1986, at 2:30 p.m., by truck. The strawberries arrived at destination in Philadelphia at approximately 5:00 p.m. on April 25, 1986, and were federally inspected at 4:25 a.m. The following morning, April 26, 1986, after having been unloaded from the truck. The inspection certificate

stated that pulp temperatures ranged from 35° to 36° F. and stated condition to be as follows:

> Mostly ripe and firm. Calyxes fresh and green. Average 7% serious damage by soft bruised and leaking berries. Decay from 5 to 33% in most (illegible) average 15% Gray Mold Rot in various stages.

5. A Ryan temperature recorder was included on the truck and the tape from the recorder showed the following:

> Trace starts at first hour at 50° and descends to 38° at third hour where there is a sharp rise to 47°. There is then a decline at an even rate to 35° at the sixth hour. Between the sixth hour and the 46th hour, temperatures ranged between approximately 37° and 39°. From the 46th to the 47th 1/2 hour, there is a rise 37° to 43° with a subsequent decline to 40° at the 51st hour. From the 51st hour to the 118th hour, temperatures are mostly 40°, occasionally as much as 42°. At the 118th hour, there begins a steady rise to 45° at the 122nd hour. The trace continues at 48° for twelve hours to the 134th hour, where a drop begins to 43° at the 135th hour with a subsequent rise to 52° at the 137th hour where the trace ends.

6. Respondent promptly communicated its rejection of the strawberries to complainant and also reported to complainant that the Ryan temperature tape ranged between 35 and 38° F.

7. Complainant placed the strawberries with Quaker City Produce Co., in Philadelphia, Pennsylvania, and such company paid complainant a total of $2,304.00 for the berries.

8. The formal complaint was filed on November 7, 1986, which was within nine months after the cause of action herein accrued.

Conclusion

Complainant asserts that it would never have agreed to "accept respondent's rejection" had it not been for the fact that respondent misrepresented the temperatures shown by the Ryan temperature tape. Complainant's acceptance of the rejection is immaterial since we have held many times that a seller always has the duty of accepting a procedurally effective rejection even if the rejection is wrongful. See *Cal/Mex Distributors Inc. v. Tom Lange Co., Inc.*, PACA Docket No. 2-6979 decided July 27, 1987, 46 Agric. Dec. ___ (1987); *Yokoyama Bros. v. Cal-Veg. Sales*, 41 Agric. Dec. 535 (1982); *Pope Packing & Sales v. Sante Fe Veg. Growers Coop. Ass'n.*, 38 Agric. Dec. 101 (1979); *Produce Rokers & Distbts. v. Monsour's*, 36 Agric. Dec. 2002 (1977); and *Bruce Church,Inc., v. Tested Best Foods Division*, 28 Agric. Dec. 337 (1969).

Respondent does not dispute the fact the temperatures on the Ryan temperature tape were misrepresented to complainant but rather maintains that such misrepresentation was unintentional. From a review of the entire record, it appears to us that respondent is correct in its assertion that the misrepresentation was unintentional. In addition, respondent asserts that its rejection was rightful due to the fact that the strawberries were clearly abnormally deteriorated on arrival, and that the temperatures shown by the Ryan temperature recorder, as well as the federal inspection following arrival, were not so high as to indicate abnormal transportation. In this assertion

respondent is wrong. Strawberries are an extremely perishable commodity and should be transported at 32° F. See *Protecting Perishable Foods During Transport by Truck,* Agricultural Handbook No. 669, September, 1987. Any substantial period of transit above approximately 40° is clearly abnormal. Consequently, the warranty of suitable shipping condition applicable of f.o.b. sales was voided by such abnormal transportation and respondent's rejection of the strawberries was wrongful.

The Uniform Commercial Code Section 2-703 provides in relevant part that, "where the buyer wrongfully rejects. . ., then with respect to any goods directly affected. . ., the aggrieved seller may. . . (d) resell and recover damages as hereafter provided (§ 2-706)." Section 2-706 provides in relevant part that "Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's beach." Respondent has not contended that the resale of the strawberries was other than proper, and accordingly, we find that complainant is entitled to the difference between the $2,304.00 which it received from Quaker City Produce Co. and the f.o.b. contract price of $4,658.10, or a net amount of $2,354.10. Respondent's failure to pay complainant such amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

Order

Within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, $2,354.10, with interest thereon at the rate of 13% per annum, from May 1, 1986, until paid.

Copies of this Order shall be served upon the parties.

KURT VAN ENGEL COMMISSION CO., INC. v. SCHULTZ SAV-O STORES, INC.

PACA Docket No. R-88-176.
Order Dismissing Complaint Issued June 27, 1989.

Jurisdiction - Election of remedies - Counterclaims - Procedure.

Complainant sued respondent before PACA. Respondent filed collateral action against complainant in a Federal district court. Complainant filed a non-compulsory counterclaim in the court action raising the same issues as were raised in the reparation proceeding. The reparation proceeding was dismissed because in filing its counterclaim, complainant had elected a judicial forum, and the Secretary will not exercise concurrent jurisdiction.

Steven E. Kravit, for Complainant.
Douglas M. Hagerman, for Respondent.
Order Issued by Donald A. Campbell, Judicial Officer.

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), Kurt Van Engel Commission Co., Inc. (KVEC), filed an informal complaint before the Secretary on January 28, 1988, and a formal complaint on March 17, 1988, in which reparation was sought for the alleged failure of Schultz Sav-O Stores, Inc. (Schultz) to pay for perishable produce in the amount of $217,670.60 purchased and received between November 5 and December 3, 1987. On May

20, 1988, Schultz filed a complaint against KVEC and others in the United States District Court for the Eastern District of Wisconsin (Case No. 88-C-561) alleging that such company bad, along with others, engaged in a conspiracy to default Schultz by means of a fraudulent kickback scheme which bound Schultz to pay excessive and unfair pries for perishable produce purchased on behalf of Schultz from KVEC over a period lasting from before January 1, 1983, to Deeember 1987. Schultz alleged violations of the Perishable Agricultural Commodities Act, the Racketeer Influenced and Corrupt Organizations Act, and various Wisconsin statutes, and sought recovery of compensatory damages in the amount of $3,000,000.00 and punitive damages in the amount of $5,000,000.00. On May 31, 1988, Schultz filed an answer in this proceeding before the Seeretary denying liability to KVEC and, in essence, set forth the alleged fraudulent kickback scheme as an affirmative defense to KVEC's PACA complaint.

On October 20, 1988, KVEC filed an answer and counterclaim in the United States District Court case. The counterclaim alleges failure of Schultz to pay for perishable produee in the amount of $217,670.60 purchased and received between November 5 and Deeember 3, 1987. Thus, the counterclaim eovers the same transaetions and seeks the same damages as in the complaint before the Seeretary.

Upon learuing in the latter part of December 1988 of KVEC's eounterclaim in the district court, the Presiding Officer issued to KVEC an order to show cause why its PACA eomplaint should not be dismissed by reason of KVEC having made an eleetion under Section 5(b) of the Act to enforce its claim in the United States district eourt rather than in this forum. KVEC's counsel responded to this order by letter of March 21, 1989.

Section 5 of the Act (7 U.S.C. § 499e) provides that any commission merehant, dealer or broker who violates any provision of Seetion 2 of the Act shall be liable to the person injured by such violation, and in addition, provides that such liability shall be "for the full amount of damages sustained in consequence of such violations." Paragraph (b) of Section 5 provides that:

> Such liability may be enforeed either (1) by complaint to the Secretary as hereinafter provided; or (2) by suit in any court of competent jurisdietion; but this seetion shall not in any way abridge or alter the remedies now existing at eommon law or by statute, and the provisions of this Act are in addition to such remedies.

We have held many times that this section requires an election of remedies by a PACA elaimant as between pursuit of reparation in this administrative forum and pursuit of a civil suit in either state or Federal eourt. *M.S. Thigpen Produce Co., Inc. v. The Park River Growers, Inc.*, PACA Docket No. 2-7307, decided Feb. 27, 1989, 48 Agric. Dec. ___ (1989); *Magic Valley Produce, Inc. v. E&R Brokerage and/or House of Good Celery, Inc.*, 40 Agric. Dee. 449 (1981); *Rigbee Potato Co. v. Belson Bros.*, 12 Agrie. Dee. 750 (1953). The one exception allowed to this requirement occurs where the PACA claimant is a party to a proceeding involving the same parties and subject matter in another forum by reason of having filed a compulsory counterclaim. *Trans-West Fruit Co., Inc. v. Ameri-Cal*, 42 Agric. Dec. 1955 (1983); *See, Abelardo Velderrain v. Dixon Tom-A-Toe Produce, Inc.*, 38 Agric. Dec. 51 (1979).

Rule 13a of the Federal Rules of Civil Proeedure provides as an exception to the requirement for the statement of a counterelaim that "such a claim need not be stated if at tbe time the action was commenced the claim was the

subject of another pending action." The phrase "another pending action" includes actions pending in an administrative forum. *See Bethlehem Steel Co. v. Lykes Bros. Steamship Co.*, 35 F.R.D. 344 (D.D.C. 1964). When the action in the United States District Court for the Eastern District of Wisconsin was commenced on May 20, 1988, KVEC's claim was already the subject of another action pending in this forum. The counterclaim in the district court was, therefore, not compulsory. KVEC has made an election of its remedies under Section 5(b) of the Act. The complaint should therefore be dismissed.

Complainant, in response to the show cause order, cited *Adams Bros. Produce Co. v. Peeples*, 37 Agric. Dec. 1216 (1978) for the proposition that in an election of remedies situation this forum would lose jurisdiction only after a binding judgment is entered in the federal district court. However, the presence of jurisdiction does not require that we continue to hear a matter when comity and the need for efficiency in the administration of justice dictate otherwise. *Trans-West Fruit Co., Inc. v. Ameri-Cal, supra* at 1958. Furthermore, in our opinion, where an apparent election has been made, we would be warranted in asserting jurisdiction thereafter only if the election were later determined for some good reason to have not been final (*Magic Valley Produce, Inc. v. E&R Brokerage and/or House of Good Celery, Inc., supra*), or the alternative forum was later shown to be without jurisdiction, or for similar reasons. It should also be noted that while *Adams Bros. Produce Co.* may correctly state the *terminus ad quem* for our jurisdiction in a situation where an election of an alternative forum has been made, such would not be the case where the PACA claimant was in the alternative forum by reason of having filed a compulsory counterclaim. *M. S. Thigpen Produce Co., Inc. v. The Park River Growers, Inc., supra.*

The complaint is dismissed.

Copies of this Order shall be served upon the parties.

PERISHABLE AGRICULTURAL COMMODITY ACT

DEFAULT DECISIONS

In re: ATLANTIC PRODUCE, INC., AND BARRIE KELLNER, KARL KELLNER, AND MEL WINICK, A PARTNERSHIP, d/b/a ATLANTIC PRODUCE.
PACA Docket No. D-88-529.
Decision and Order filed October 17, 1988.

Failure to file an answer - Failure to make full prompt payment.

Edward M. Silverstein, for Complainant.
Respondents, Pro se.
Decision and Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

Preliminnry Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act," instituted by a complaint filed on May 4, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period October 1986 through October 1987, the corporate respondent and/or the partnership respondent purchased, received, and accepted, in interstate and foreign commerce, from 44 sellers, 124 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $171,891.30.

Copies of the complaint were served upon respondents, but neither respondent has filed an answer. The time for filing answers having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Atlantic Produce, Inc., the "corporate respondent," is a corporation, whose address is 95 North West 13th Avenue, Pompano Beach, Florida 33069; respondent Atlantic Produce, the "partnership respondent," is a partnership consisting of Barrie Kellner, Karl Kellner, and Mel Winick, whose address also is 95 North West 13th Avenue, Pompano Beach, Florida 33069.

2. The corporate respondent has never been licensed under the Act, but it conducted business subject to the Act as a dealer, as that term is defined in Section 1(6) of the Act (7 U.S.C. § 499a(6)) during at least the period October 1986 through October 1987. Messrs. Barrie Kellner, Karl Kellner, and Mel Winick, each of whom is either an officer, director and/or stockholder of the corporate respondent, were issued a license under the Act, number 860972, as a partnership doing business as Atlantic Produce, on April 11, 1986. This license was subject to renewal on or before April 11, 1988, but was automatically suspended, on November 3, 1987, pursuant to Section 7(d) of the Act (7 U.S.C. § 499g(d)) when the partnership respondent failed to satisfy a reparation award issued against it in PACA Docket No. RD-87-492.

3. As more fully set forth in paragraph 5 of the complaint, during the period October 1986 through October 1987, the corporate respondent and/or the partoership respoodent purchased, received, and accepted in interstate and foreign commerce, from 44 sellers, 124 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $171,891,30.

Conclusion

Respondents' failure to make full payment promptly with respect to the 124 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that Atlantic Produce, Inc., has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

The license issued to Barrie Kellner, Karl Kellner and Mel Winick, a partnership, d/b/a Atlantic Produce, under the Perishable Agricultural Commodities Act is revoked.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sectioos 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final January 26, 1989.-Editor]

In re: J. T. GREENE PRODUCE, INC.
PACA Docket No. D-88-549.
Decision and Order filed December 8, 1988.

Failure to file an answer - Failure to make full prompt payment.

Andrew Y. Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding uoder the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act," instituted by a complaint filed on September 23, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged io the complaint that during the period September 1987 through March 1988, respondent purchased, received, and accepted, in interstate and foreign commerce, from 34 sellers, 133 lots of fruits and vegetables, all being perishable agricultural commodities,

but failed to make full payment promptly of the agreed purchase prices, in the total amount of $375,490.09.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, J. T. Greene Produce, Inc., is a corporation, whose address is 3661 So. Pine Street, Ocala, Florida 32670.

2. Pursuant to the licensing provisions of the Act, license number 730311 was issued to respondent on September 18, 1972. This license was renewed annually, but terminated on September 18, 1988, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period September 1987 through March 1988, respondent purchased, received, and accepted in interstate and foreign commerce, from 34 sellers, 133 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $375,490.09.

Conclusion

Respondent's failure to make full payment promptly with respect to the 133 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final February 17, 1989.-Editor]

In re: STANLEY SUSSMAN, INC., a/t/a ANGELO DIGIACOMO.
PACA Docket No. D-88-546.
Decision and Order filed December 21, 1988.

Failure to file an answer - Failure to make full prompt payment - Failure to maintain sufficient trust assets.

Andrew Y. Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by Paul Kane, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act," instituted by a complaint filed on September 7, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period September 1986 through March 1987, respondent purchased, received, and accepted, in interstate and foreign commerce, from 18 sellers, 116 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $416,500.63. It is also alleged that respondent failed to maintain sufficient assets in trust.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Stanley Sussman, Inc., a/t/a Angelo DiGiacomo, is a corporation, whose address is 3300 South Galloway Street, Philadelphia, Pennsylvania 19148.

2. Pursuant to the licensing provisions of the Act, license number 850678 was issued to respondent on February 20, 1986. This license was renewed annually, but terminated on February 20, 1988, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraphs 5 and 6 of the complaint, during the period September 1986 through March 1987, respondent purchased, received, and accepted, in interstate and foreign commerce, from 18 sellers, 116 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $416,500.63, and thus failed to maintain sufficient assets in trust.

Conclusion

Respondent's failure to make full payment promptly and maintain sufficient assets in trust with respect to the 116 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant

violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final March 11, 1989.-Editor]

In re: SUNFRESH DISTRIBUTING CO.
PACA Docket No. D-88-542.
Decision and Order filed December 22, 1988.

Failure to file an answer - Failure to make full prompt payment - Failure to maintain sufficient trust assets.

Andrew Y. Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act," instituted by a complaint filed on August 25, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period March 1987 through August 1987, respondent purchased, received, and accepted, in interstate and foreign commerce, from 23 sellers, 76 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $694,608.65. It is also alleged that respondent failed to maintain sufficient assets in trust.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Sunfresh Distributing Co., is a corporation, whose address is P.O. Box 21037, Los Angeles, California 90021.

2. Pursuant to the licensing provisions of the Act, license number 800471 was issued to respondent on February 1, 1980. This license was renewed annually, but terminated on February 1, 1988, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraphs 5 and 6 of the complaint, during the period March 1987 through August 1987, respondent purchased, received, and accepted in interstate and foreign commerce, from 23 sellers, 76 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $694,608.65, and thus failed to maintain sufficient assets in trust.

Conclusion

Respondent's failure to make full payment promptly and maintain sufficient assets in trust with respect to the 76 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final April 4, 1989.-Editor]

In re: ALTABON FOODS, INC.
PACA Docket No. D-88-544.
Decision and Order filed January 10, 1989.

Failure to file an answer - Failure to make full prompt payment - Failure to maintain sufficient trust assets.

Andrew Y. Stanton, for Complainant.
Randy Buchanan, for Respondent.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act," instituted by a complaint filed on September 7, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period August 1986 through September 1987, respondent

purchased, received, and accepted, in interstate and foreign commerce, from 22 sellers, 757 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $2,500,492.09. It is also alleged that respondent failed to maintain sufficient assets in trust.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Altabon Foods, Inc., is a corporation, whose address is P.O. Box 1758, Santa Maria, California 93456.

2. Pursuant to the licensing provisions of the Act, license number 861096 was issued to respondent on April 29, 1986. This license was renewed annually, but terminated on April 29, 1988, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraphs 5 and 6 of the complaint, during the period August 1986 through September 1987, respondent purchased, received, and accepted in interstate and foreign commerce, from 22 sellers, 757 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $2,500,492.09, and thus failed to maintain sufficient assets in trust.

Conclusion

Respondent's failure to make full payment promptly and maintain sufficient assets in trust with respect to the 757 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final February 21, 1989.-Editor]

In re: L. A. PRODUCE CO.
PACA Docket No. D-88-543.
Decision and Order filed January 31, 1989.

Failure to file an answer - Failure to make full prompt payment.

Edward M. Silverstein, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act," instituted by a complaint filed on August 31, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period January 1986 through May 1987, respondent purchased, received and accepted, in interstate and foreign commerce, from eight sellers, 68 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $318,916.74.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, L. A. Produce Company, is a corporation, whose address is 706 Market Court, Los Angeles, California 90021.

2. Pursuant to the licensing provisions of the Act, license number 780096 was issued to respondent on October 19, 1977, was renewed annually, presently is in effect, and was next subject to renewal on or before October 19, 1988.

3. As more fully set forth in paragraph 5 of the complaint, during the period January 1986 through May 1987, respondent purchased, received and accepted in interstate and foreign commerce, from eight sellers, 68 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount $318,916.74.

Conclusion

Respondent's failure to make full payment promptly with respect to the 68 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final April 3, 1989.-Editor]

In re: HAMADY BROS. FOOD MARKETS, INC.
PACA Docket No. D-88-548.
Decision and Order filed March 2, 1989.

Failure to file an answer - Failure to make full prompt payment.

Sharlene Lassiter, for Complainant.
Respondent, Pro se.
Decision and Order issued by James Hunt, Administrative Law Judge.

In this disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a, *et seq.*) hereinafter referred to as the Act, the complaint, instituted by a complaint filed on September 12, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complainant alleges that during the period September 22, 1987 through October 16, 1987, respondent purchased, received and accepted 64 lots of fruits and vegetables being perishable agricultural commodities, from eight sellers but failed to make full payment of the agreed upon purchase prices, or balances thereof in the total amount of $335,483.57.

A copy of the complaint was served upon respondent on September 15, 1988. Respondent failed to file an answer within the time allotted. (7 C.F.R. § 1.136). Respondent's failure to file an answer constitutes an admission of the allegations. (7 C.F.R. § 1.136). Consequently, complainant filed a motion for the issuance of a decision. Therefore, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Hamady Bros. Food Markets, Inc., hereinafter referred to as the respondent, is a corporation whose mailing address is 3301 So. Dort Highway, Flint, Michigan 48507.

2. Pursuant to the licensing provisions of the Act, license #090680 was issued to respondent on July 24, 1944. The license was renewed annually, and is next subject to renewal on or before July 24, 1989.

3. As more fully set forth in paragraph five of the complaint, during the period September 22, 1987, through October 16, 1987, respondent failed to make full payment promptly to eight sellers of the agreed purchase prices, or balances thereof, in the total amount of $335,483.57 for 64 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate and foreign commerce.

4. On November 12, 1987, respondent filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 701 *et seq.*), in the United

States Bankruptcy Court for the Eastern District of Michigan, which has been designated as Case No. 87-08827.

Conclusion

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, constitute willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b) for which the Order below is issued.

Order

The license of respondent Hamady Bros. Food Markets, Inc., is hereby revoked.

The Order shall take effect on the eleventh day after this decision becomes final.

Pursuant to the Rules of Practice governing proceedings under the Act, this decision will become final without further proceedings 35 days after service, unless appealed to the Secretary by a party to the proceeding within 30 days of the service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final April 19, 1989.-Editor]

In re: HILL PRODUCE, INC., d/b/a TULSA PRODUCE CO.
PACA Docket No. D-88-538.
Decision and Order filed March 24, 1989.

Failure to file an answer - Failure to make full prompt payment.

Allan R. Kahan, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act," instituted by a complaint filed on July 18, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period June 1987 through January 1988, respondent purchased, received and accepted, in interstate and foreign commerce, from eight sellers, 90 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $254,359.45.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Hill Produce, Inc., is a corporation doing business as Tuls Produce Co., whose address is 76-B N. Trenton, Tulsa, Oklahoma 74120.

2. Pursuant to the licensing provisions of the Act, license number 80151 was issued to respondent on September 5, 1980, was renewed annuall presently is in effect, and was next subject to renewal on or before Septembe 5, 1988, but expired because of the non-payment of the renewal fee.

3. As more fully set forth in paragraph 5 of the complaint, during th period June 1987 through January 1988, respondent purchased, received an accepted in interstate and foreign commerce, from eight sellers, 90 lots c fruits and vegetables, all being perishable agricultural commodities, but faile to make full payment promptly of the agreed purchase prices, or balance thereof, in the total amount of $254,359.45.

Conclusion

Respondent's failure to make full payment promptly with respect to the 9 transactions set forth in Finding of Fact No. 3, above, constitutes willfu repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), fc which the Order below is issued.

Order

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decisio becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, th Decision will become final without further proceedings thirty-five days aft service hereof, unless appealed to the Secretary by a party to the proceedin within thirty days after service as provided in sections 1.139 and 1.145 of th Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final May 8, 1989.-Editor]

, & L PACKAGE PRODUCE, INC.
ocket No. D-88-502.
d Order filed March 30, 1989.

er - Failure to make full prompt payment - Failure to maintain sufficie

lainant.

dwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

y proceeding under the Perishable Agricultur as amended (7 U.S.C. § 499a *et seq.*) hereinafte nstituted by a complaint filed on November 4, 198 ruit and Vegetable Division, Agricultural Marketin

Service, United States Department of Agriculture. It is alleged in the complaint that during the period June 1987 through June 1988, respondent purchased, received and accepted, in interstate and foreign commerce, from 34 sellers, 181 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $390,809.20, and failed to maintain sufficient assets in trust.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, L&L Package Produce, Inc., is a corporation, whose address is 1020 Hall Street, S.W., Grand Rapids, Michigan 49503.

2. Pursuant to the licensing provisions of the Act, license number 164014 was issued to respondent on April 30, 1956, was renewed annually, presently is in effect, and is next subject to renewal on or before April 30, 1989.

3. As more fully set forth in paragraphs 5 and 6 of the complaint, during the period June 1987 through June 1988, respondent purchased, received and accepted in interstate and foreign commerce, from 34 sellers, 181 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $390,809.20, and thereby failed to maintain sufficient assets in trust.

Conclusion

Respondent's failure to make full payment promptly with respect to the 181 transactions set forth in Finding of Fact No. 3, above, and respondent's failure to maintain sufficient assets in trust, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final May 15, 1989.-Editor]

In re: CHESTER H. ARTER, JR., d/b/a LA BELLE PRODUCE CENTER AND LA BELLE PRODUCE CENTER, INC.
PACA Docket No. D-89-503.
Decision and Order filed April 5, 1989.

Failure to file an answer - Failure to make full prompt payment - Failure to maintain statutory trust.

Andrew Y. Stanton, for Complainant.
Respondents, Pro se.
Decision and Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act," instituted by a complaint filed on December 14, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period March 1987 through January 1988, respondents purchased, received, and accepted, in interstate and foreign commerce, from 31 sellers, 175 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $1,311,182.15. It is also alleged that respondents failed to maintain the statutory trust.

A copy of the the complaint was served upon respondents which complaint has not been answered. The time for filing an answer having run and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Respondent, Chester H. Arter, Jr., d/b/a La Belle Produce Center, is an individual, whose business address is 920 Plane Street, Columbia, Pennsylvania 17512, and whose mailing address is 649 Plane Street, Columbia, Pennsylvania 17512.

(b) Respondent, La Belle Produce Center, Inc., is a corporation whose address is 920 Plane Street, Columbia Pennsylvania 17512.

2. (a) Pursuant to the licensing provisions of the Act, license number 841761 was issued to the individual respondent on July 30, 1984. This license was renewed annually, but terminated on July 30, 1988, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee.

(b) The corporate respondent has never been licensed under the Act, but did business subject to license.

3. As more fully set forth in paragraph 5 of the complaint, during the period March 1987 through January 1988, respondents purchased, received, and accepted in interstate and foreign commerce, from 31 sellers, 175 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $1,311,182.15.

4. As more fully set forth in paragraph 6 of the complaint, respondents failed to maintain the statutory trust.

Conclusion

Respondents' failure to make full payment promptly and maintain the trust with respect to the 175 transactions set forth in Findings of Fact 3 and 4, above, constitute willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondents have committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final May 16, 1989.-Editor]

In re: U.S. FOOD MARKETING, INC.
PACA Docket No. 2-7557.
Decision and Order filed June 5, 1989.

Failure to appear at hearing - Failure to make full prompt payment.

Sharlene Lassiter, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), initiated by a complaint filed on June 11, 1987. Respondent's Answer denied the complaint's material allegations. A hearing was held before me in Washington, D.C. on May 16, 1989. Respondent did not appear at the hearing although it was duly notified. At the hearing, and in writing on May 25, 1989, complainant moved for the issuance of a Default Decision pursuant to Rule of Practice 1.141(c).

Respondent's failure to appea

remained unpaid. (Testimony of Jane Servais) Therefore, respondent's failure to appear at hearing constitutes an admission on those contentions.

Respondent's failures to make full payment to 26 sellers in the amount of $93,888.70 over a period of seven months, of which at least $50,000.00 remains unpaid two years later constitutes flagrant and repeated violations of the Act. Respondent's violations are also willful. As a licensee under the Act, respondent is held to knowledge of the Act's prompt payment provisions.

Order

Respondent, U.S. Food Marketing, Inc., has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the 11th day after this Decision becomes final.

This Order shall become final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to Section 1.145 of the applicable Rules of Practice (7 C.F.R. § 1.145).[1]

[This Decision and Order became final July 15, 1989.-Editor]

---

[1]Without consulting the undersigned Judge, the Offire of the Hearing Clerk, USDA, mistakenly sent a copy of Complainant's Motion for Default Decision to respondent on May 30, 1989, with a Notice that stated, "In accordance with the applicable Rules of Practice, respondent will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the proposed Decision and Order." Despite that notice, this Order is effective as stated. The Hearing Clerk's Office apparently issued its notice pursuant to Rule of Practice 1.139. However, since respondent failed to appear at the hearing and complainant presented evidence at the hearing, pursuant to Rule of Practice 1.141(e), no notice to respondent is required before issuance of this Decision and Order.

CONSENT DECISIONS

(Not published herein-Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

Martin & Jones Produce, Inc. PACA Docket No. D-88-521. 3/6/89.